LIBRARY
SUPREME COURT, U. S.

No. 448

Office Supreme Court, U.S.
FILED
AUG 8 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent
FARMERS' COOPERATIVE COMPRESS, Intervenor

FARMERS' COOPERATIVE COMPRESS, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent
UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Intervenor

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John Edward Price
Attorney
300 Equitable Savings Bldg.
811 Lamar Street
Fort Worth, Texas 76102
Counsel for Farmers' Cooperative Compress

Washington, D. C. · THIEL PRESS · 202 · 393-0825

INDEX

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 7

APPENDIX A:

Decision of the National Labor Relations Board 8

APPENDIX B:

Opinion of the United States Court of Appeals for the District of Columbia Circuit—dated February 7, 1969 10

APPENDIX C:

Judgment of the United States Court of Appeals for the District of Columbia Circuit—filed February 7, 1969 29

APPENDIX D:

Order of the United States Court of Appeals for the District of Columbia Ciruit—Separate Statement of Senior Circuit Judge Danaher 31

CITATIONS

Bakery Wagon Drivers and Salesmen, Local 484 v. N.L.R.B., 321 F.2d 353 6

J.C. Penny Co. v. N.L.R.B., 384 F.2d 479 6

Montgomery Ward & Co. v. N.L.R.B., 385 F.2d 769 6

N.L.R.B. v. Bradley Washfountain Co., 192 F.2d 144 6

N.L.R.B. v. Burnup & Sims, 379 U.S. 21 5-6

N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375 6

N.L.R.B. v. Washington Aluminum Co., 379 U.S. 9 6

STATUTES

National Labor Relations Act:

Section 7 (29 U.S.C.A. 1964 ed., Section 157) 3
Section 8(a)(1) (29 U.S.C.A. 1964 ed., Section 158(a)(1) 2, 3, 4, 5, 6
Section 8(a)(5) (29 U.S.C.A. 1964 ed., Section 158(a)(5) 3
Section 10(f) (29 U.S.C.A. 1964 ed., Section 160(f) 3

Equal Employment Opportunities Act:

Section 2000e-5(g) (42 U.S.C.A. 1964, Section 2000e-5(g) . . . 4

MISCELLANEOUS

N.L.R.B. Rules and Regulations, Section 102.15 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent
FARMERS' COOPERATIVE COMPRESS, Intervenor

FARMERS' COOPERATIVE COMPRESS, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent
UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Intervenor

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John Edward Price, on behalf of Farmers' Cooperative Compress, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the National Labor Relations Board (Appendix A *infra*, pp. 8-9) entered January 23, 1968, is reported at 169 N.L.R.B. No. 70. The opinion of the United States Court of Appeals for the District of Columbia Circuit entered February 7, 1969 (Appendix B *infra*, pp. 10-28) is not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 7, 1969 (Appendix C *infra*, pp. 29-30). The order denying a rehearing by the United States Court of Appeals was entered on May 12, 1969 (Appendix D *infra*, pp. 31-32). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

Whether an employer's policy and practice of invidious discrimination against its employees on account of race or national origin violates Section 8(a)(1) of the National Labor Relations Act.

Whether the issue of Section 8(a)(1) violations based on racial and nationality discrimination was properly before the United States Court of Appeals for the District of Columbia Circuit.

STATUTES INVOLVED

The following statutory provisions are set forth:

I. Section 8(a)(1) of the National Labor Relations Act: [29 U.S.C.A. Section 158 (a)(1) (1964)]

> "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title [.]"

II. Section 7 of the National Labor Relations Act: [29 U.S.C.A. Section 157 (1964)]

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

STATEMENT

United Packinghouse, Food and Allied Workers, AFL-CIO is the certified representative of the production and maintenance employees of Farmers' Cooperative Compress, a Texas company engaged in the processing of cotton. The union struck the plant on September 13, 1966, and then filed unfair labor practice charges with the National Labor Relations Board on September 19, 1966. The company was charged with violations of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act. The complaint was amended before the hearing to include the allegation that the company had refused to bargain with the union concerning methods of eliminating racial discrimination in the plant. A hearing was held on January 17-20, 1967, to litigate the issues. The Trial Examiner issued his decision on June 23, 1967, finding that the company had engaged in certain unfair labor practices. The union excepted to the Trial Examiner's failure to find the company in violation of Section 8(a)(1) for its acts of racial and national origin discrimination. The Board issued its *Decision and Order* on January 23, 1968, adopting the findings of the Examiner with certain modifications.

On January 29, 1968, the union filed a petition for review of the order with the United States Court of Appeals for the District of Columbia Circuit pursuant to Section 10(f) of the National Labor Relations Act [29 U.S.C.A. Section 160(f).] On February 14, 1968, the company filed a petition for review with the United States Court of Appeals for the Fifth Circuit which was transferred to the

District of Columbia Circuit upon a motion by the Board. Both cases were consolidated in that court. The Board on April 24, 1968, filed an answer to the company's petition and a cross-petition for enforcement of its order as it stood. On February 7, 1969, a three judge panel of the United States Court of Appeals held that an employer's policy and practice of invidious discrimination on account of race or national origin violated Section 8(a)(1) of the NLRA. The Court of Appeals later denied a petition for rehearing on May 12, 1969.

REASONS FOR GRANTING THE WRIT

I. (A) The United States Court of Appeals for the District of Columbia Circuit has made an important interpretation of federal law which should be settled by this Court. The Court of Appeals has held that an employer's policy and practice of invidious discrimination because of race or national origin violates Section 8(a)(1) of the NLRA. It is important for the Supreme Court to rule upon this question because of its potential effect upon all industry affecting commerce and upon the administration of the national labor policies.

It is reasonable to believe that this decision could so enlarge the case load of the NLRB that it would bog down and overwhelm the Board processes and make the Board less effective. Victims of racial discrimination in employment would file charges under the NLRA rather than the Civil Rights Act because the NLRA offers more rapid and effective relief. The Board can act directly and affirmatively while the EEOC cannot. The jurisdiction of the Board under the NLRA is much broader since it covers all employees in industry affecting commerce. Also, other forms of invidious discrimination such as sex or religion could be held to be unfair labor practices, so that victims of such discrimination would also add to the numbers of employees turning to the Board rather than the EEOC.

(B) A decision of such importance should be well-founded in reason and in law. But in this case, the Court's

reasoning is neither convincing nor supported by legal precedent.

The premise of the Court is that racial discrimination inhibits employees from asserting themselves against their employer to improve their lot. The Court attempts to prove their premise by pointing to two alleged effects of racial discrimination which when taken together would inhibit employee collective action. However, these effects are too inconclusive to support their premise. According to the Court, racial discrimination would set up an unjustified clash of interests between black and white employees which would reduce the likelihood of their being able to work in concert. Racial discrimination also creates in its victims a docility which would make them unwilling to assert their rights.

With regard to the first effect, in any instance where an employer makes a distinction between employees which gives a favorable advantage to one group, there will be those in the group who would favor its perpetuation. This would be true whether or not the distinction was unjustified. If the reasoning of the Court is correct, then any action of an employer which is not favorable to all employees alike would be unlawful since one group would be favored and its interests would clash with that of the other group.

With regard to the second effect, the claims of fear of retaliation and ignorance of rights would be more appropriate prior to the passage of the Civil Rights Act and other such legislation and executive orders. At the present time, it would seem more logical to say that instead of becoming docile, a worker would be more aggressive in asserting his statutory rights and in seeking the remedies that are now available to employer discrimination.

Legal precedent also does not support the findings of the Court. The Supreme Court has held that acts of employers with an intent or effect of preventing collective action were unlawful under Section 8(a)(1). *N.L.R.B, v. Burnup & Sims,*

379 U.S. 21; *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375; *N.L.R.B v. Washington Aluminum Co.*, 370 U.S. 9. But no court has ever held that a policy and practice of racial discrimination had such an intent or effect.

II. There is also the question of legality of the procedure used to bring this question before the Court of Appeals. The complaint in this case did not include the allegation that the company had violated Section 8(a)(1) for its acts of racial and national origin discrimination. The Board may not take evidence on matters which are not alleged in the complaint. *Bakery Wagon Drivers and Salesmen, Local 484 v. N.L.R.B.*, 116 U.S. App. D.C. 87, 90, 321 F.2d 353, 356; *Montgomery Ward & Co. v. N.L.R.B.*, 385 F.2d 760, 763-764; NLRB Rules and Regulations Section 102.15. These allegations were contained in the union's exceptions to the findings of the Trial Examiner.

The Board found that the complaint did not mention the additional Section 8(a)(1) violations and that the matter was not sufficiently litigated to warrant a finding of an independent violation. The courts have said in the past that they cannot enforce a finding which was based on a charge not contained in the complaint and where it was not sufficiently litigated. *J. C. Penny Co. v. N.L.R.B.*, 384 F.2d 479; *N.L.R.B. v. Bradley Washfountain Co.*, 192 F.2d 144. Thus, the question of the additional 8(a)(1) violations was properly before the Court of Appeals. The decision of the Court of Appeals was not in accord with due process and it renders the procedural process in labor cases meaningless.

CONCLUSION

To settle an important question of interpretation of the National Labor Relations Act, both from the standpoint of the law and its procedural process, the writ of certiorari should be granted.

Respectfully submitted,

JOHN EDWARD PRICE
300 Equitable Savings Bldg.
811 Lamar Street
Fort Worth, Texas 76102
Attorney at Law

APPENDIX A

FARMERS' COOPERATIVE COMPRESS and UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO.

169 NLRB No. 70, Case No. 16-CA-2802, January 25 1968, Alba B. Martin, Trial Examiner.

Before BROWN, JENKINS, JR. and ZAGORIA

John Edward Price and Norman Bennett, Fort Worth, Tex., for Employer. Marion G. Ramon, Fort Worth, Tex., for Union. Robert L. Penrice and Evert P. Rhea for NLRB.

TRIAL EXAMINER'S FINDINGS AND CONCLUSIONS

Employer is charged with violating Section 8(a)(1) and (5) of the Act.

Although employer negotiated with the union as its employees' bargaining representative, the employees did not believe that it was negotiating justly. Therefore, they voted to strike. Between the date of the vote and the date of the strike, employer engaged in numerous interrogations, threats and promises in an effort to undermine the union's bargaining power and its capacity to mount a successful strike.

For example, employer promised employees permanent employment for not going on strike, threatened loss of jobs for going on strike, encouraged employees to petition to vote the union out, questioned employees about their union activities and their intentions with respect to the strike, and promised raises if the strike was eliminated. All of these activities interfered with the employees' protected rights, in violation of Section 8(a)(1) of the Act.

Employer made it clear that it had no intention of executing a contract with the union through its bargaining over cost or money items. Not only did it approach the union with a take-it-or-leave-it attitude, but it attempted to by-pass the union and deal directly with the employees. In fact, it unilaterally granted the employees a paid holiday

and a wage increase. This action in itself constituted an unlawful refusal to bargain, in violation of Section 8(a)(5) of the Act.

There was other evidence of employer's animosity toward the union and bargaining. For example, on the day after the first bargaining session, employer assigned to outside work assignments, in the bitter cold, several employees who had participated in the bargaining session as members of the union negotiating committee.

Under all of the circumstances, it is clear that employer never bargained in good faith over wage and cost items and thereby violated Section 8(a)(5) and (1) of the Act.

Employer also refused to bargain in good faith over the elimination of certain existing racial discrimination practices. Employees of minority groups were paid less than other employees for the same work. In addition, minority group employees were consistently excluded from overtime assignments. In essence, employer did not intend to change these practices and either tried to side-step the issue by alleging that it was not aware of any discrimination or by asserting defenses obviously contrary to the facts. All the while, of course, employer refused to discuss the matter with the union in a meaningful fashion. In this respect too, then, employer violated Section 8(a)(5) and (1) of the Act

BOARD'S DECISION

The Trial Examiner's findings and conclusions are adopted.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,627

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

FARMERS' COOPERATIVE COMPRESS, Intervenor

No. 21,825

FARMERS' COOPERATIVE COMPRESS, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Intervenor

---

Petitions for Review and Cross-Petition
for Enforcement of an Order
of the National Labor Relations Board

Decided February 7, 1969

Mr. Richard F. Watt, with whom *Messrs. Eugene Cotton* and *Michael H. Gottesman* were on the brief, for petitioner in No. 21,627. *Mr. Michael H. Gottesman* entered an appearance for intervenor in No. 21,825.

Mr. John Edward Price for petitioner in No. 21,825 and intervenor in No. 21,627.

Mrs. Nancy M. Sherman, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Mitchell L. Strickler*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before PRETTYMAN, *Senior Circuit Judge*, and DANAHER* and WRIGHT, *Circuit Judges*.

WRIGHT, *Circuit Judge*: Farmers' Cooperative Compress is a Texas corporation engaged in processing cotton. The United Packinghouse, Food and Allied Workers, AFL-CIO was certified as representative of the company's production and maintenance employees in December 1965 after an election conducted by the National Labor Relations Board. The union and the company thereupon commenced bargaining over a contract, the sessions lasting until June 1966. On September 13, 1966, after filing unfair labor practice charges with the Board, the union struck the plant. The Board found that the company had violated Sections 8(a)(1)[1] and 8(a)(5)[2] of the National Labor Relations Act. It ordered the company to cease and desist certain practices,

---

*Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

[1] 29 U.S.C. § 158(a)(1) (1964):

"It shall be an unfair labor practice for an employer–

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]"

29 U.S.C. § 157 (1964) (§ 7 of the Act):

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *."

[2] 29 U.S.C. § 158(a)(5) (1964):

"It shall be an unfair labor practice for an employer–

* * * * *

"(5) to refuse to bargain collectively with the representative of his employees * * *."

to bargain in good faith with the union over economic working conditions, to bargain in good faith with the union over the condition of racial discrimination against Negro and Latin American workers, and to reinstate strikers with back pay.[3]

We have before us: (1) the company's claim that the Board's order against it was not supported by the evidence[4]; (2) the union's claim that the Board's order did not go far enough—the union agrees with the Board's finding that the company's refusal to bargain over racial discrimination violates Section 8(a)(5), but the union argues that the Board should also have found that the company's practice of discrimination against Latin American and Negro employees is itself a violation of Section 8(a)(1)[5]; and (3) the Board's cross-petition for enforcement of its order as it stands.

We affirm the Board's order against the company. The particulars of the labor dispute, the unfair labor practices, and the basis for our enforcement of the Board's order are set out in Parts I and II of this opinion. In addition, without staying the enforcement of that order, in Part III

---

[3]The order is found at 169 N.L.R.B. No. 70 (1968).

[4]We find no merit in the company's claim that the order is ambiguous.

[5]The union makes two other claims. As to the first—that the remedy against the company in general is insufficient—*see* Note 7 *infra*. As to the second—that the Board erred in not following the Examiner in finding that the company's rejection of an arbitration clause was a violation of § 8(a)(5)—we think that in the circumstances of this case it was within the Board's discretion not to rely on the Examiner's finding in this respect.

I

The Trial Examiner found, and the Board adopted his finding,[6] that:

> "Between the strike vote and the strike, and particularly during the several weeks just before the strike, Respondent [company] engaged in numerous interrogations, threats and promises, in an effort to undermine the Union's bargaining power and its capacity to mount a successful strike."

The evidence the Examiner adduced to support his finding included statements by the company's general manager, assistant manager, plant supervisor and other company officials to some employees to the effect that if the employees did not join the strike they would receive better-paying jobs and other benefits. The Examiner also found that company officials told the employees to spread the word of these benefits for men who did not join the strike. The Examiner concluded that the company thereby violated Section 8(a)(1).

Our standard on review is whether there is substantial evidence to support the Board's findings. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951); *American Federation of Television & Radio Artists* v. *N.L.R.B.*, ___ U.S. App.D.C. ___, 395 F.2d 622 (1968). Here there is little doubt that the Board could reasonably find that the actions of the company officials had the effect, in the words of Section 8(a)(1), of "interfer[ing] with, restrain[ing], or coerc[ing] employees" in the exercise of their rights to organize and to strike, as guaranteed in Section 7 of the Act. Indeed, on oral argument the company conceded that these actions violate Section 8(a)(1).

The Trial Examiner also found, and the Board adopted the finding, that the company did not intend to bargain in

---

[6]The Board adopted the Examiner's findings with minor exceptions having to do with practices the Examiner found which the Board felt were not fully litigated on the record before it.

good faith; he found that the company never intended to enter into a contract. To support this conclusion he relied, *inter alia*, on the following: a company official made a statement to some employees to the effect that the company would never sign a contract with the union; the company's initial contract offer, in response to the union's first proposal, set out wage scales essentially unchanged from the existing ones; the company refused to bargain about "cost" items, *i.e.*, items which would increase the company's expenses (these included pay during funeral leave, overtime pay, holiday pay, retirement benefits, sick and accident pay, the furnishing of tools, clothing allowance and life insurance); the company instituted during the bargaining a holiday for the employees; the company gave a dinner for employees during the bargaining at which it announced, with insufficient notice to the union to allow meaningful bargaining, a wage increase. The Examiner found that the bargaining had not reached a valid impasse; rather, he found that the company had a take-it-or-leave-it attitude throughout the bargaining. Thus he concluded that even though the company had agreed to several union proposals the company was bargaining in bad faith.

The company's obligation under Section 8(a)(5) to bargain in good faith about the conditions of employment must be "more than a willingness to enter upon a sterile discussion of union-management differences." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 402 (1952). The facts going into a determination of good faith must be viewed as a whole—"[t]here is no *per se* test of good faith" in bargaining. *Warehousemen & Mail Order Employees, Local No. 743* v. *N.L.R.B.*, 112 U.S.App.D.C. 280, 283, 302 F.2d 865, 868 (1962). We have said that good faith bargaining is "largely a matter for the Board's expertise." *Fruit & Vegetable Packers, Local 760* v. *N.L.R.B.*, 114 U.S. App.D.C. 388, 389-390, 316 F.2d 389, 390-391 (1963).

We cannot say here that substantial evidence to support findings of Section 8(a)(1) and Section 8(a)(5) violations

was lacking. No valid bargaining impasse can be said to occur when the bargaining deadlock is caused by the failure of one of the parties to bargain in good faith. *Industrial Union of Marine & Shipbuilding Workers* v. *N.L.R.B.*, 3 Cir., 320 F.2d 615 (1963), *cert. denied*, 375 U.S. 984 (1964). The company's bargaining posture is certainly open to interpretation as a take-it-or-leave-it stance, and the holiday and wage increases can well be said to have been calculated to undermine the union's bargaining position. These circumstances warrant upholding the Board's finding of unfair labor practices.[7] *See N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962); *N.L.R.B.* v. *Insurance Agents' Union*, 361 U.S. 477 (1960); *N.L.R.B.* v. *Crompton-Highland Mills*, 337 U.S. 217 (1949); *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376 (1945).

II

The Trial Examiner found, and the Board affirmed, that the company further violated Section 8(a)(5) in that:

> "In addition to refusing to bargain in good faith concerning economic matters, Respondent also refused to bargain in good faith with the Union concerning the elimination of discriminatory racial practices going on in the plant. Respondent bargained with the Union on the inclusion of a non-discrimination clause in the contract, while simultaneously refusing to bargain mean-

---

[7] On the matter of remedy, the union requested that the Board give compensatory relief to the workers by making them whole for any gains they would have received but for the company's refusal to bargain and reach agreement. The Board denied this relief without giving any reasons. Such relief is being considered by the Board in at least four pending cases. The matter of remedy is, of course, a matter for the Board's discretion. However, we think that the Board should state reasons when it wholly denies a major type of relief requested, at least where it is actively considering such relief elsewhere. Since this case is being remanded on the discrimination issue, it will be open to the union to renew its request for compensatory relief at that time. Should the Board deny the relief, such denial should be accompanied by a brief statement of the reasons therefor.

ingfully and in depth concerning actual racial discrimination practices then going on. * * *"

To determine if the company violated Section 8(a)(5) in this respect, the Examiner first admitted testimony on whether discrimination did in fact exist. This testimony included matters brought up in the bargaining as well as general practices in the plant.[8] Roughly summarized, the evidence indicates the following facts:

In west Texas, where the company's plant is located, it is common practice to classify people into three groups—Negroes, Latin Americans (also called Mexicans) and whites (also called Anglos). A person is regarded as Latin American if he is of Mexican origin, regardless of whether he was born in or is a citizen of the United States. The company employed up to 550 persons in its busy season, about 85 to 100 persons otherwise. The employees came from all three "racial" classifications, a sizable percentage being Negroes and Latin Americans.

The company has a few employees with guaranteed weekly salaries over the year. These jobs were filled by whites. The company's highest hourly rate jobs—$1.80 per hour—were filled largely by whites. One employee, Jesse Ruiz (a Latin American), worked on a job weighing cotton. He had been classified in a different job which was scaled for a lower hourly wage. He was paid this latter wage, even though he did the work of a weigher. The other weighers, with one exception,[9] were white, and all received the higher wage.

---

[8]The Examiner considered some practices and events which arose more than six months prior to the filing of unfair labor practice charges and thus could not be considered as violations of the Act. 29 U.S.C. § 160(b) (1964). However, the Examiner properly considered this evidence "to shed light on the true character of matters occurring within the limitations period." *Local Lodge No. 1424, Int. Ass'n of Machinists* v. *N.L.R.B.*, 362 U.S. 411, 417 (1960); *Int. U., United Automobile etc. Workers* v. *N.L.R.B.*, 124 U.S.App.D.C. 215, 219, 363 F.2d 702, 706 (1966).

[9]The one exception was a Latin American who had reached the $1.80 pay scale in another department and then was transferred to work as a weigher.

The company's warehouses have a sprinkler system for fire prevention. Until 1963, any employee who wanted to, including Latin Americans and Negroes, could and did receive overtime work as fireguards checking the sprinklers. In 1963 an electric alarm system was installed, and as a result there was need for only two men to check the sprinklers. The two men who received this overtime work were whites. A Latin American had asked for the work but did not get it. From 1963 to 1966 (the time of the charges and hearing) no Negroes or Latin Americans got this work. The qualifications for checking the sprinklers were not high; in fact, there was evidence that the two whites had to be shown how to set the sprinkler valves, something which other employees, including Negroes and Latin Americans, knew how to do.

The company had an annual practice of providing, at its expense, group fishing trips for its employees. Regarding these trips, the Examiner found:

> "* * * First, Respondent takes office personnel and Anglo employees and their wives on a fishing trip; next it takes Anglo employees who do not wish to take along their wives; next it takes Latin and Negro employees without their wives. In 1965 and 1966 the Anglo trips were to a point about 700 miles away and lasted the best part of a week; the Latin-Negro trips were to a point about 300 miles away and lasted no more than 3 or 4 days. * * *"

The Examiner concluded that these facts showed discrimination. He found that the company failed to bargain in good faith about the two specific issues the union raised in the negotiations: employee Ruiz and the sprinkler work.[10]

---

[10]The company did agree to a general non-discrimination clause. However, the Examiner could reasonably have found that such a clause meant little if the company would not also work to correct individual grievances. *See Local Union No. 12, United Rubber etc. Workers* v. *N.L.R.B.*, 5 Cir., 368 F.2d 12, 14 (1966), *cert. denied*, 389 U.S. 837 (1967), where the collective bargaining agreement provided for non-discriminatory seniority for employees but where "[a]s

As to Ruiz, he found that the company took evasive positions, denying at first that Ruiz did a weigher's job, then saying that maybe he was unqualified, and finally saying there was nothing the company could do about it. With regard to the sprinkler work, the Examiner found that the company was equally evasive. First the company said that no Negroes or Latin Americans got the work because none applied. When it was pointed out that at least one had asked for the work, the company then said that the whites were more qualified, but offered no proof to that effect (in fact the evidence indicated the reverse). The evidence amply supports the Examiner's conclusion that the company did not bargain in good faith over these employment conditions.

Finally, the union proposed that the company change its policy of using employees in higher-paying work while maintaining their lower-paying classifications. The union sought to establish a seniority system and open bidding for high-paying jobs that opened up, either permanently or temporarily. It was in this context that the Ruiz discussion took place. The company refused to relinquish its status of being the sole judge of qualifications, and the Examiner found that the company

> "gave no meaningful reasons for its positions on these issues. The basic reasons were that the Union's proposals challenged the status quo which protected the practice of racial discrimination, and Respondent did not intend to change that practice."

The Board, adopting the Examiner's findings, ordered the company to bargain in good faith with the union over racially discriminatory practices. The record fully supports the Board's order.[11]

---

a matter of custom and interpretation * * * Negro employees with greater seniority had no rights over white employees with less seniority * * *."

[11] One issue, discussed by the Board and the union in their briefs, bears comment: whether the Board is deprived of jurisdiction in the area of racial discrimination by the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–12(a) (1964). Section 703

III

We turn now to the question: can an employer's policy and practice of invidious discrimination against its employees on account of race or national origin violate Section 8(a)(1) of the National Labor Relations Act? When established as hereinafter discussed, we answer this question in

---

of that Act, 42 U.S.C. § 2000e–3(a), provides that an employer's racial discrimination is unlawful. The Act sets up machinery for individuals to bring grievances to the Equal Employment Opportunity Commission. However, the Commission has no enforcement power of its own, and ultimately the individual has to go to court to enforce his rights.

The Act itself says nothing to indicate that the National Labor Relations Board is ousted from jurisdiction in these matters, and an examination of the legislative history demonstrates that the Board was not meant to be. Senator Clark read to the Senate a letter from the Department of Justice regarding this point. The letter stated, in part:

> "* * * If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. * * * [T]itle VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. * * *"

110 CONG. REC. (Part 6) 7207 (1964). Later, Senator Tower proposed an amendment to the Act which would have made the provisions of Title VII the exclusive means of relief for such practices, depriving "any department, agency, or instrumentality in the executive branch of the Government, or any independent agency of the United States" from granting relief. The amendment was defeated by a vote of 59 to 29. 110 CONG. REC. (Part 10) 13650-13652 (1964).

Since Title VII does not give to the EEOC any enforcement powers, it may be advantageous for a person aggrieved by racial discrimination in employment to use other means of obtaining relief. Professor Rosen has noted:

> "* * * Primarily because the NLRB bears the expenses of enforcement of the NLRA, offers the other general advantages of administrative enforcement, has a backlog time before the NLRB six months shorter than before the federal district courts, and has no express requirement to defer to state FEP [Fair Employment Practices] agencies, representatives of civil rights orga-

the affirmative and remand this part of the case to the Board for further proceedings.[12]

Preliminarily, we find that the area of racial discrimination is not new to the Board. Although we have found no cases in which an employer's policy of discrimination as such was alleged to be a violation of the Act, there is a history of union discrimination coming within the Board's jurisdiction.

---

nizations have preferred NLRB enforcement over title VII enforcement of FEP. * * *"

Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 GEO. WASH. L. REV. 846, 887 (1966). (Footnotes omitted.)

The Fifth Circuit, in *Local Union No. 12, United Rubber etc. Workers* v. *N.L.R.B.*, *supra* Note 10, noted that a claim of unfair labor practices against a union for racial discrimination could be brought before the Board despite Title VII's making such discrimination an unlawful union practice. Similarly here, it is open to the employees to use either Title VII or the NLRA or both. The Board has concurrent jurisdiction with the EEOC. *Compare* the concurrent jurisdiction of United States agencies to remedy discrimination in employment in federal programs under Executive Order No. 11246, 30 FED. REG. 12319 (1965).

That history begins with holdings by the Supreme Court that unions have a statutory duty of "fair representation," first under the Railway Labor Act, later under the National Labor Relations Act. This duty means that a union cannot discriminate against Negroes when it represents the interests of employees. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); *Syres* v. *Oil Workers International Union, Local No. 23*, 350 U.S. 892 (1955); *Conley* v. *Gibson*, 355 U.S. 41 (1957).

The Board adopted the Court-enunciated doctrine of fair representation and found that its violation is a union unfair labor practice under the NLRA. *Independent Metal Workers Union, Local No. 1*, 147 N.L.R.B. 1573 (1964); *Locals 1367 & 1368, International Longshoremen's Ass'n*, 148 N.L.R.B. 897 (1964), *enforced*, 5 Cir., 368 F.2d 1010 (1966), *cert. denied*, 389 U.S. 837 (1967); *Local No. 12, United Rubber etc. Workers*, 150 N.L.R.B. 312 (1964), *enforced*, 5 Cir., 368 F.2d 12 (1966), *cert. denied*, 389 U.S. 837 (1967). The Fifth Circuit enforced the Board's order in *Rubber Workers*, upholding its determination that violation of the duty of fair representation is an unfair labor practice. This court, relying on the above line of cases, has reached the same conclusion. *Truck Drivers & Helpers, Local Union 568* v. *N.L.R.B.*, 126 U.S.App.D.C. 360, 379 F.2d 137 (1967). With the exception of *Truck Drivers*, these cases all involved racial discrimination. Thus it is apparent that the Board has not felt itself unable to examine charges of union racial discrimination to determine whether they are true, and, if true, what the effect is on the discriminated employees. No reason appears why employer discrimination is exempt from Board scrutiny.[13]

---

[13]The Board has examined employer racial discrimination in another context. It has held that an employer violates the Act if, during an

In order to hold that employer racial discrimination violates Section 8(a)(1) it must be found that such discrimination is not merely unjustified, but that it interferes with or restrains discriminated employees from exercising their statutory right to act concertedly for their own aid or protection, as guaranteeed by Section 7 of the Act.[14] To be sure, Section 7 rights are not to be taken narrowly. That section protects concerted activity by workers to alleviate oppressive working conditions, regardless of whether their activity is channeled through a union, through collective bargaining, or through some other means. *Morrison-Knudsen Co.* v. *N.L.R.B.*, 9 Cir., 358 F.2d 411 (1966); *Salt River Valley Water Users' Ass'n* v. *N.L.R.B.*, 9 Cir., 206 F.2d 325 (1953). And racially integrated working conditions are valid objects for employee action. *N.L.R.B.* v. *Tanner Motor Livery, Ltd.*, 9 Cir., 349 F.2d 1 (1965). The right to act concertedly for mutual aid obviously includes the right to act freely, without employer compulsion or deterrence against such activity. *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945). Thus in the context of employer racial discrimination the question reduces to whether that discrimination inhibits its victims from asserting themselves against their employer to improve their lot.

---

election to certify a union, the employer makes flagrant appeals to racial prejudice in an attempt to defeat the union. *See, e.g., Sewell Manufacturing Co.*, 138 N.L.R.B. 66 (1962).

[14]It should be noted that no one in this case is attempting—nor could such an attempt possibly succeed—to justify racial discrimination in employment. It has always been unjustified, even before it was explicitly made illegal by Title VII of the Civil Rights Act of 1964. Neither is anyone questioning the enormous impact such discrimination has on the flow of commerce and on the allocation of economic resources in this country, perhaps best summed up by the appalling fact that as of 1963 "the Negro college graduate * * * on the average earn[ed] less in his lifetime than the white 8th grade drop out." Friedman, *Racial Problems and Labor Relations: The Civil Rights Act*, in T. CHRISTENSEN (ed.), N.Y.U. EIGHTEENTH ANNUAL CONFERENCE ON LABOR 367, 369 (1966) (referring to Bureau of Census figures given in Senate hearings on the civil rights bill).

We find that an employer's invidious discrimination on account of race or national origin has such an effect. This effect is twofold: (1) racial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination. *We find that the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1).*[15]

The first effect is obvious—racial discrimination sets apart the white from the Negro (and Latin American) workers. The principle of "divide and conquer" is older than the history of labor relations in this country, but that does not lessen its application here. The white workers expend their energy against the Negroes, the latter resent the whites, and neither group sees that sometimes their interests might be better served by joint action against their common employer. When white employees may suffer from upgrading the positions of Negroes, the employer's policy of discrimination inevitably sets group against group, thus frustrating the possibility of effective concerted action.[16]

---

[15]We are not faced with a situation where an employer arbitrarily groups employees on some basis other than race. On oral argument a hypothetical situation was posed where an employer grouped workers by political party affiliation. Counsel for the union took the position that such action, simply because it is arbitrary and sets workers apart, would violate the Act. We need not go so far here; we only decide that the Act is violated where the arbitrary discrimination also has the effect of producing a docility in its victims which inhibits the exercise of their § 7 rights.

[16]This effect was noted by James B. Carey, president of the International Union of Electrical, Radio and Machine Workers, in his testimony before the House on the 1963 equal employment bills. HEARINGS BEFORE GENERAL SUBCOMMITTEE ON LABOR, HOUSE COMMITTEE ON EDUCATION AND LABOR, ON H.R. 405, 88th Cong., 1st Sess., pp. 66-67 (1963). *See also* Drotning, *Race Propaganda: The NLRB's Impact on Employer Subtlety and the Effect of This Propaganda on Voting*, 18 LAB. L. J. 172 (1967).

Gunnar Myrdal, in his study AN AMERICAN DILEMMA (1944), noted this factor in employment race relations:

> "When once the white workers' desires for social prestige become mobilized against the Negroes * * *, when they have come to look upon Negroes as different from themselves and consequently do not feel a common labor solidarity with them, 'economic interests' also will back up discrimination. * * * To give white workers a monopoly on all promotions is, of course, to give them a vested interest in job segregation.
>
> "Negroes, on their side, have to try to utilize every opening, even if it means working for lower wages or under inferior working conditions. The abundance of Negro labor, kept idle because of exclusionist policies, must always be feared by white workers. If given the chance, Negroes will accept positions as 'sweatshop' competitors—something which cannot fail to increase the resentment of white wage earners. * * * The Negroes react by being suspicious of the white workers and their unions. * * *
>
> "The racial beliefs are conveniently at hand to rationalize prejudice and discriminatory practices. * * *"

Vol. 1, pp. 391-392.

The Board does not dispute Myrdal's findings. Rather, it points to other discriminations in employment, such as that based on seniority; it suggests the conflicting interests resulting from a seniority system cannot support a Section 8(a)(1) charge. This argument misses the point. First, the seniority distinction may be reasonably justified, whereas here the basis for discrimination is not only unjustified but in fact illegal. Second, we are not holding that all discrimination, even where unjustified, is by itself sufficient to make out a violation. Rather, as noted in Note 15, *supra*, it is the conjunction of the unreasonable and illegal discrimination with the induced docility in the discriminated group which is the basis of our unfair labor practice holding.

The conclusion that racial discrimination may impede its victims in asserting their rights seems inescapable. This docility stems from a number of factors—fear, ignorance of

rights, and a feeling of low self-esteem engendered by repeated second class treatment because of race or national origin. Discrimination in employment is no different in this respect than discrimination in other spheres. In its historic decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 494 (1954), the Supreme Court stated:

> "* * * To separate [Negroes] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. * * *"

This docility has been recognized by union leaders, businessmen, government officials and psychologists. Thus George Meany, president of the AFL-CIO, referred to the reluctance of Negro employees to file complaints under fair employment practices laws because of the fear of retaliation which accompanies racial discrimination.[17] Senate and House hearings on equal employment bills are laced with references to the degradation, disillusionment, lack of motivation, and lessening of incentive to improve which result from racial discrimination in employment.[18] The Civil Rights Commission has shown the debilitating effect of menial labor on Negroes, and has pointed up the reluctance

---

[17] HEARINGS BEFORE SUBCOMMITTEE ON EMPLOYMENT AND MANPOWER, SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, ON S. 773, 88th Cong., 1st Sess., p. 153 (1963) (statement of George Meany). *See also id.* at p. 169 (statement of Walter Reuther, president, United Automobile Workers and Industrial Union Department, AFL-CIO); *id.* at p. 425 (statement of Roy Richardson, personnel manager, Honeywell Aeronautical Division).

[18] *See* SENATE HEARINGS, *supra* Note 17, p. 383 (colloquy among Senators Clark and Pell and Herman P. Miller, Bureau of Census); HOUSE HEARINGS, *supra* Note 16, p. 49 (statement of Congressman Jacob Gilbert); *id.* at p. 364 (report of D. C. Advisory Committee to U. S. Commission on Civil Rights). *See also* H.R. Rep. No. 570, 88th Cong., 1st Sess., p. 3 (1963); H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (additional statement of Congressman William M. McCulloch *et al.*), reprinted in 2 U.S. CODE CONG. & AD. NEWS 2391, 2514-2515 (1964).

of those Negroes to ask for improvement.[19] Psychological studies have pointed out the psychologically debilitating effects of discrimination in general,[20] and Dr. Kenneth B. Clark, especially in his book DARK GHETTO (1965), has shown how discrimination-induced self-hatred in Negro inhabitants of slums, due in good part to discrimination in employment, creates a feeling of inferiority and lack of motivation to assert themselves to change their condition. In all this, discrimination in employment thus establishes, or reinforces the effect of, discrimination in other areas—an inhibition to act for change.[21]

Finally, this docility has been demonstrated by the record in this case. The Trial Examiner found explicitly that the policy of discrimination had this effect. His decision noted:[22]

> "The great sense of inferiority of the 'Mexican' in the area * * * was shown by answers on cross-examination of the chairman of the negotiating committee, Fernando Gonzales. Although by his demeanor he impressed me as one of the natural leaders of the Latin group of employees, an impression corroborated by his selection as chairman of the negotiating committee, he

---

[19] *See* U.S. COMMISSION ON CIVIL RIGHTS, CYCLE TO NOWHERE 29-33 (1968).

[20] *See* H. WITMER & R. KOTINSKY (eds.), PERSONALITY IN THE MAKING ch. VI (1952).

[21] The Board argues that because some Negroes or Latin Americans do not react passively, and many, as in this case, do join unions, this docility effect does not exist. However, as the text shows, the effect does exist for the majority of discriminated Negroes and other minority groups of different national origin. In 1954 some Negro children stood up for their rights and demanded integration while other Negro children continued to go to segregated schools. This circumstance does not gainsay the Supreme Court's finding in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), of the debilitating effects of discrimination.

[22] These excerpts from the Examiner's decision are not meant to show particular violations of the Act; rather, they are quoted to illustrate the docility produced by discrimination.

was not inclined to stand up for his rights when, the morning after the first bargaining session, which he had attended, he was sent out into the cold to perform the 'flagging' job. Asked on cross-examination if he asked why he was being sent out there, Gonzales replied, 'You don't ask questions there, sir; you only do what you are told.' * * *

"This same sense of inferiority and docility on the part of the 'Mexican' group was further disclosed through the testimony of Polo Arias * * *. [After being transferred to a lower-paying job] he did not ask why * * *. [He testified] 'in a company like that you don't ask questions, you just do what they tell you.' Elaborating, a little later he repeated the substance of this answer, and added: '. . . I am a grown man and I know, you know, what you are supposed to do and what you are not supposed to do, even if you have got the right to do it.' He added that he knew he would not gain anything by asking.

* * * * *

"It is clear on this record, and I conclude, that the only reason Respondent paid Ruiz $1.50 an hour for seven months while he was doing a $1.80 job which five or six Anglos were concurrently paid $1.80 for performing, was because Respondent considered Ruiz and the other minority employees as docile, cheap, labor, and in order to keep them in this condition of servitude. * * *"[23]

---

[23]The Examiner's decision also noted:

"* * * An answer of Jessie Ruiz reflected the inner conflict under which a Latin in the area labors. He was born in the United States and has spent all his life in and around West Texas. Asked his race he replied, 'Well, I am a white just as much as anybody else, I would guess, but I am considered as Latin-American.' * * *

* * * * *

"Some time 'awhile back' Latin Joe Rogers asked his foreman if he could fire watch on Saturdays and Sundays, adding that Rogers needed the money. The foreman said he would look into it. The foreman never mentioned it further, and, consistent with the docility that goes with the prevailing sense of inferiority, neither did Rogers. Rogers has had no overtime on the sprinklers in the last 3 years * * *."

In the light of these considerations, we conclude that an employer's policy and practice of invidious discrimination on account of race or national origin is a violation of Section 8(a)(1). For the reasons noted above, the case is remanded to the Board for hearings on whether the company here has such a policy and practice. If the Board finds that the company does, the Board shall order an appropriate remedy.

Order affirmed; case remanded for further proceedings.

PRETTYMAN, *Senior Circuit Judge:* I concur in the remand for hearings and findings. As I see it, Section 8(a)(1) of this statute makes illegal any act, policy or program of an employer which interferes with, restrains or coerces employees in the exercise of rights given them by Section 7 of the Act. In the matter before us the complainant alleged that this employer has such a policy and program. In that situation the Board should receive the evidence and make findings. In my judgment it makes no difference what the program is called or how it is catalogued; if, in fact, by its use the employer interferes with, restrains or coerces his employees in the exercise of Section 7 rights, it is an unfair labor practice and is prohibited. I think it is neither necessary nor advisable for us at this time to explore in depth the possibilities of a program such as complainant depicts; I think we should await a finding of the facts. My brethren think otherwise. I concur in the result.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,627 [Filed Feb. 7, 1969]

United Packinghouse, Food and Allied Workers International Union, AFL-CIO,
Petitioner,

v.

National Labor Relations Board,
Respondent,

Farmers' Cooperative Compress,
Intervenor.

No. 21,825

Farmers' Cooperative Compress,
Petitioner,

v.

National Labor Relations Board,
Respondent,

United Packinghouse Workers of America, AFL-CIO,
Intervenor.

Petitions for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

Before: Prettyman, Senior Circuit Judge; Danaher* and Wright, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

---

*Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the order of the National Labor Relations Board on review herein be, and it is hereby, affirmed, and it is

FURTHER ORDERED AND ADJUDGED by this Court that these cases are remanded to the National Labor Relations Board for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

Dated: February 7, 1969.
Opinion by Circuit Judge Wright.
Separate opinion by Senior Circuit Judge Prettyman concurring in the result.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,627 September Term, 1968

United Packinghouse, Food and Allied Workers International Union, AFL-CIO,
Petitioner,

v.

National Labor Relations Board,
Respondent,

Farmers' Cooperative Compress,
Intervenor.

No. 21,825

Farmers' Cooperative Compress,
Petitioner,

v.

National Labor Relations Board,
Respondent,

United Packinghouse Workers of America, AFL-CIO,
Intervenor.

Before: Prettyman and Danaher, Senior Circuit Judges, and Wright, Circuit Judge, in Chambers.

ORDER

On consideration of petitioner's petition for rehearing in No. 21,825 and intervenor's petition for rehearing in No. 21,627, it is

ORDERED by the Court that petitioner's and intervenor's aforesaid petitions are denied.

Per Curiam.

A separate statement of Senior Circuit Judge Danaher as to why he voted against rehearing is attached.

No. 21,627—*United Packinghouse, etc. v. N.L.R.B.*

No. 21,825—*Farmers' Cooperative Compress v. N.L.R.B.*

Separate Statement of Senior Circuit Judge Danaher As To Why He Votes To Deny Rehearing

DANAHER, Senior Circuit Judge: I vote to deny the petition for rehearing filed by Farmers' Cooperative Compress. I believe the Intervenor-Petitioner has misapprehended the import of the court's opinion and the representations made to us are irrelevant in light of our holding.

We had specifically pointed out on this aspect of the case that the question of refusal by the company to bargain in good faith over racially discriminatory practices involves several elements which cumulatively can culminate in a violation of the Act. For example, has the company developed and practiced a policy of discrimination against its employees? Is that policy, so practiced, "invidious"? Does it reflect discrimination "on account of race or national origin"? In essence "can" that policy and practice constitute a violation of the Act? We did *not* say that such a violation had here been demonstrated. But *if* so established, and in the manner and by such means as we have discussed, the employer's policy and practice *can* violate the Act. That is what we said.

Our remand, in short, called for hearings and a determination as to whether this employer actually had evolved a policy and had put that policy into practice so as to result in *invidious* "discrimination on account of race or national origin." Such is the inquiry which is to be conducted, and properly in my view, with an ultimate conclusion to depend upon the Board's findings. There may *not* be, but assuredly there "can" be a violation in the respects under discussion, and that is what our opinion says. I adhere to it.

INDEX

	Page
Opinions below	1
Jurisdiction	1, 2
Question presented	2
Statute involved	2
Statement	2
A. The Board's decision	2
B. The court of appeals decision	5
Argument	7
Conclusion	10
Appendix	11-57
Statutes:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*):	
Section 7	2, 6
Section 8(a)(1)	2, 3, 6, 7, 8, 9
Section 8(a)(5)	3, 6, 8

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 448

FARMERS' COOPERATIVE COMPRESS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 10-28) is not yet officially reported. The Board's decision and order are reported at 169 NLRB No. 70, and are set out in the Appendix, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1969 (Pet. 29-30), and a petition for rehearing was denied on May 12, 1969 (Pet. 4,

31-32). The petition for a writ of certiorari was filed on August 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTION PRESENTED

Whether an employer's practice of maintaining employment conditions which discriminate against certain of his employees solely because of their race or national origin tends to restrain those employees in the exercise of their right to engage in concerted activity protected by Section 7 of the National Labor Relations Act, and thus violates Section 8(a)(1) of that Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition at pp. 2-3.

STATEMENT

A. The Board's Decision

Farmers Cooperative Compress (the Company) processes cotton at its plant in Lubbock, Texas. During its busy season (September-February) the Company employs some 550 workers; off-season employment decreases to about 85-100. A high percentage of the employees are Negro, or of Latin American descent (App. 17). In December 1965, the United Packinghouse, Food & Allied Workers, AFL-CIO,[1] was cer-

[1] The Union was a party in the court of appeals, and thus is a party here.

tified as collective bargaining agent for the Company's production and maintenance employees. Bargaining negotiations between the Company and the Union began on February 1, 1966, and continued until June 16, when negotiations collapsed and the employees voted to strike. A final negotiation session, held on September 1, also failed to produce an agreement, and the strike started on September 13 (App. 17-18). On September 19, the Union filed unfair labor practice charges with the Board, and a complaint issued alleging that the Company had violated Section 8(a)(1) and (5) of the Act. The Section 8(a)(5) portion of the complaint, but not the Section 8(a)(1) portion, included allegations of racial discrimination (App. 15-16).

After hearing, the Trial Examiner found that the Company had violated Section 8(a)(1) of the Act "[b]y promising employees permanent employment for not going on strike, by threatening loss of jobs for going on strike, by encouraging employees to petition and vote the Union out, by interrogating employees concerning their union activities and their intentions about joining or not joining the strike, by promising a raise if the Union is eliminated, and by other acts" (App. 51). The Examiner also found that the Company had violated Section 8(a)(5) by bargaining in bad faith about wages and other "cost" items, with no intention of entering into an agreement with the Union; by unilaterally awarding a paid holiday on July 4 and a 10-cent per hour wage increase on September 2; and by refusing to bargain in good faith with the Union about the elimination of employment conditions in the plant which discrim-

inated against the Company's Negro and Latin American employees (App. 34-35, 43-44, 47, 51).

The discrimination finding was based on the following evidence: Employee Jesse Ruiz, who was regarded as a Latin American,[2] had been employed by the Company since 1961. During the 1965-66 busy season, when he worked primarily as a weigher, he was paid only $1.50 per hour although all other weighers received $1.80. All but one of the other weighers were white (App. 39-40). The Examiner found "that the only reason [the Company] paid Ruiz $1.50 an hour for 7 months while he was doing a $1.80 job which five or six Anglos were concurrently paid $1.80 for performing, was because [the Company] considered Ruiz and the other minority employees as docile, cheap labor, and in order to keep them in this condition of servitude" (App. 41-42). During the bargaining negotiations, the Company rebuffed the Union's effort to discuss discriminatory wage practices, exemplified by Ruiz' experience, by denying that it engaged in such practices. It also claimed that Ruiz was not qualified as a weigher, and that, in any event, he had been laid off in the interim (App. 42).

The Company's warehouses have a sprinkler system for fire prevention. Until 1963, any employee who wanted to, including Latin Americans and Negroes, could and did receive overtime work as fireguards checking the sprinklers. In 1963, an electric alarm system was installed, and as a result only two

---

[2] In West Texas, a person is so regarded if he is of Mexican origin, regardless whether he was born in or is a citizen of the United States (App. 17, 37).

men were needed to check the sprinklers. Since then only white employees have received this work (App. 44). The Company refused to discuss with the Union its method of awarding this overtime work, claiming that there was no regular overtime work on the sprinkler system, that the two white employees who received the work were the most qualified to perform it, and that it knew of no racial discrimination in regard to its assignment (App. 46). The evidence suggested that the white employees were, if anything, less well qualified for the job (App. 46-47).

The Examiner recommended, *inter alia*, that the Company cease and desist from the unfair labor practices found, that it bargain collectively with the Union "with respect to rates of pay, wages, hours of employment, and other conditions of employment including the condition of racial discrimination," and that it reinstate the strikers upon their unconditional application to return to work (App. 51-53). The Board, with minor modifications not in issue here, adopted the Examiner's findings, conclusions, and recommended order (App. 12-14).

B. The court of appeals decision

The court of appeals sustained the Board's unfair labor practice findings and enforced its order (Pet. 12-18). However, the court, in agreement with the Union,[3] found that the question whether an employer's policy and practice of invidious discrimination

[3] The Union had raised this issue before the Board in its exceptions to the Trial Examiner's decision, and had pursued it in the petition to review the Board's order which it filed in the court of appeals.

against its employees on account of race or national origin violated Section 8(a)(1) of the Act was also presented and held that such discrimination violates that section. The court reasoned as follows. Section 7 of the Act "protects concerted activity by workers to alleviate oppressive working conditions" and "racially integrated working conditions are valid objects for employee action." An employer's invidious discrimination on account of race or national origin: (1) "sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act"; and (2) "creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination." The "confluence of these two factors," the court concluded, "sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1)." (Pet. 22-23, emphasis omitted.) The court remanded the case to the Board for hearings on whether the Company in fact had a policy and practice of invidious discrimination,[4] and

[4] As the court more fully explained in footnote 12 of its opinion, which is omitted from the material reproduced at Pet. App. 20:

> The posture of this case leads us to order a remand on this issue. The unfair labor practice hearing against the company included a charged violation of Section 8(a)(5) for failure to bargain about racial discrimination. However, the Board's General Counsel explicitly did not proceed on a theory that the discrimination itself violated Section 8(a)(1). As noted, evidence indicating racial discrimination was produced to aid in finding whether there was a Section 8(a)(5) bargaining violation. Thus

directed the Board, if it "finds that the company does," to "order an appropriate remedy" (Pet. 28).

ARGUMENT

The petition presents two related issues: 1) whether the court of appeals properly had before it the question whether an employer's policy and practice of racial and nationality discrimination among its employees violates Section 8(a)(1) of the Act; and 2) if so, what the resolution of that question should be. The first is a question not warranting review in this Court; while the second is undoubtedly

---

the matter of the company's racial policies was litigated and the Examiner found, and the Board agreed, that the company did practice racial discrimination. We think, however, that in fairness to the company it should have an opportunity to have the matter more fully litigated, with notice that the question of a Section 8(a)(1) violation is specifically to be determined. Thus the case is remanded to the Board to conduct such a hearing.

We note that where the matter is litigated, even though the particular violation has not been specifically charged, the Board can find such a violation. See *American Newspaper Publishers Assn.* v. *N.L.R.B.*, 7 Cir., 193 F. 2d 782 (1951); *Independent Metal Workers Union, Local No. 1*, 147 N.L.R.B. 1573 (1964).

In the portion of its opinion omitted from the material reproduced at Pet. App. 12, the court stated:

> In addition, without staying the enforcement of that order, in Part III we remand the case to the Board for a hearing on whether the company has a policy and practice of discrimination against its employees on account of their race or national origin. We hold that such a policy and practice violates Section 8(a)(1) of the Act. If the Board finds that the company engages in such a policy and practice, it will devise an appropriate remedy.

important in the administration of the Act, on the present record it is not ripe for review.

1. The court of appeals reached the question whether an employer's racially discriminatory practices could violate Section 8(a)(1) although such a violation was neither specifically charged nor specifically dealt with by the Examiner or the Board. As the court (n. 4, *supra*) noted in this case, however, the Board can find a violation even though it has not been specifically charged, where the matter is sufficiently litigated. Through its exceptions to the Trial Examiner's decision, the Union sought to have the Board make such a finding; extensive evidence indicating racial and nationality discrimination in fact was produced in connection with the Section 8(a)(5) bargaining violation issue. In these circumstances, the conclusion of the court below that the Section 8(a)(1) issue was sufficiently present to warrant it in deciding that issue presents essentially a factual issue, unique to this case, and as to which review in this Court would not be warranted.

2. In view of the court's remand of the case to the Board for hearings and findings on the Company's employment practices and policies in order to determine whether a violation of Section 8(a)(1) has occurred, its conclusion that such a violation could be found on the basis of racially discriminatory policies is not yet ripe for review. On remand, the Company will have an opportunity to show—as it maintained in regard to the specific instances brought up in bargaining negotiations (see *supra*, pp.

4-5)—that, in fact, it does not engage in racial or nationality discrimination. If it is successful in rebutting the *prima facie* showing of such discrimination now contained in the record, no violation of Section 8(a)(1) will be found against it, and the ruling of the court below on that issue will become academic in this case. On the other hand, if the further hearing confirms that the Company does practice racial and nationality discrimination and if the Board, finding that such discrimination violates Section 8(a)(1), issues a further order remedying that violation, the Company will at that time be able to seek review of that finding and order in the court below and in this Court on a fully developed record. In these circumstances, the issue does not as yet warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

SEPTEMBER 1969.

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 16-CA-2802

FARMERS' COOPERATIVE COMPRESS

and

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO

DECISION AND ORDER

On June 23, 1967, Trial Examiner Alba B. Martin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent, the General Counsel, and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and

the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations[2] of the Trial Examiner, as modified herein.

Claiming, *inter alia*, that the matter had occurred more than 6 months before the charge was filed and therefore barred by Section 10(b) of the Act, Respondent excepted to the Trial Examiner's finding that it violated Section 8(a)(1) of the Act by sending Fernando Gonzales and Joe Rogers to work outside in the cold on the morning after the first bargaining session in reprisal against these men for serving on the bargaining committee. The record shows that Rogers and Gonzales were sent outside to work on February 2, 1966. Rogers remained outside for 3 weeks and Gonzales for "two months or so." The complaint, however, does not specifically mention this matter, nor are we satisfied that the matter was sufficiently litigated to warrant a finding of an independent violation. Apart from 10(b) considerations, therefore, we do not find such independent 8(a)(1) violations and do not adopt 1(f) of the Trial Examiner's Recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Farmers' Coop-

---

[1] The date in footnote 1 of the Trial Examiner's Decision is hereby corrected to read September 19, 1966.

[2] In adopting the Trial Examiner's finding that Respondent violated Section 8(a)(5), we do not rely on his conclusions concerning Respondent's unwillingness to accept an arbitration clause.

erative Compress, Lubbock, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified herein:

1. Delete paragraphs 1(f) and 2(c) of the Trial Examiner's Recommended Order and reletter the remaining paragraphs accordingly.

2. Add the following as paragraph 2(c), the present paragraph 2(c) and those subsequent thereto being relettered accordingly:

"(c) Notify the striking employees if presently serving in the Armed Forces of the United States of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces."

3. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

4. Delete the sixth and eleventh indented paragraphs of the "Appendix."

5. Add the following immediately above the line at the bottom of the Appendix attached to the Trial Examiner's Decision:

NOTE: We will notify the striking employees if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

6. Delete from relettered paragraph 2(d) of the Trial Examiner's Recommended Order that part thereof which reads "to be furnished" and substitute therefor "on forms provided . . ."

Dated, Washington, D. C.

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 16-CA-2802

FARMERS' COOPERATIVE COMPRESS

and

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO

Robert L. Penrice, Esq., and *Evert P. Rhea, Esq.*, for the General Counsel.

John Edward Price, Esq., and Norman Bennett, Esq., of Fort Worth, Tex., for the Company.

Mr. Marion G. Ramon, of Fort Worth, Tex., for the Union.

TRIAL EXAMINER'S DECISION

Statement of the Case

ALBA B. MARTIN, Trial Examiner: This proceeding, with all parties represented, was heard before the undersigned Trial Examiner in Lubbock, Texas, on January 17-20, 1967, on complaint of the General Counsel and answer of Farmers' Cooperative Compress, Respondent herein.[1] The issues litigated were whether Respondent refused to bargain in good faith with the Union concerning "cost items," wages, and

---

[1] The Union filed the charge on September 19, 1968.

working conditions in the plant including the elimination of racial discrimination; whether Respondent made unilateral changes of wages and conditions of employment; and whether Respondent engaged in numerous 8(a)(1) violations including threats, interrogations and promises of benefits.

After the hearing the General Counsel and Respondent filed helpful briefs which have been carefully considered.

Upon the entire record and my observation of the witnesses, I hereby make the following:

Findings and Conclusions

I. The Business of the Respondent

Respondent, a Texas corporation with its principal office and place of business in Lubbock, Texas, is engaged in compressing, processing, shipping and storing cotton. During the year prior to the issuance of the complaint in November 1966, Respondent manufactured, sold and distributed at its plant [2] in Lubbock, Texas, products valued in excess of $500,000, of which products valued in excess of $50,000 were shipped directly to States of the United States other than the State of Texas. Respondent admitted, and I find, that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization

United Packinghouse, Food and Allied Workers, AFL-CIO, herein called the Union, is a labor organi-

---

[2] There were four warehouses, all referred to herein as the plant.

zation within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Setting; and Chronology

During its busy season from about September to February, as the newly harvested cotton is coming into the warehouses Respondent employs up to about 550 employees. During the off season, from about February to about September, this number is reduced to about 85 to 100 employees. A high percentage of the employees are from the minority groups in the West Texas area; they are Negroes or Latin-Americans. Within the parlance of the area a person is a Latin-American, or "Mexican," according to lineage, even though he was born, raised, and schooled in this country. The record showed that a prevailing hope among Latin-American seasonal employees was that they obtain year-around employment from Respondent.

At an election conducted by the Board's Regional Director on December 17, 1965, a majority of the employess in a production and maintenance unit selected the Union as their bargaining agent. The Union was certified on December 28, 1965.

Between February 1 and June 16, 1966, representatives of the Respondent and the Union met and negotiated some 13 times on 12 days.

On June 16 and 23, the employees voted to strike on the grounds that the Company was not negotiating "justly." The Union's bargaining committee was given authority to call the strike. It called the strike on September 13, 1966, at which time a "big majority" of the employees walked out on strike. The strike was still on at the time of the hearing herein in January 1967.

On July 4, 1966 Respondent unilaterally gave the employees a paid holiday.

Between the strike vote in June, and the strike call in September, on August 24, Respondent made the Union a written offer of a 10-cent wage increase and almost simultaneously assembled all the employees, fed them a "dinner," and talked to them about the offer. After discussing the offer with the Union on September 1, the following day, September 2, Respondent put a 10-cent wage increase into effect.

Between the strike vote and the strike, and particularly during the several weeks just before the strike, Respondent engaged in numerous interrogations, threats and promises, in an effort to undermine the Union's bargaining power and its capacity to mount a successful strike.

The Union and the Company held two more negotiation sessions, one on September 1 and the other on December 29. No contract resulted. As has been seen above, the Union filed its 8(a)(1), (5) charge herein on September 19.

B. Interrogations, Threats, Promises, Underminings

Almost all of the General Counsel's testimony set forth below in this section of this Decision was undenied and uncontradicted.

On the first day of Edward Sanchez' employment, in early August 1966, when Sanchez asked Respondent's general manager, Tom Brown, for a year-around job, Brown replied that he could not tell him anything about that. On September 9, four days before the strike, Brown reminded Sanchez that he had earlier asked for full-time employment, said that he was ready to offer Sanchez a full-time job, and said Sanchez could consider himself a permanent

employee as long as he did not go out on strike. Then Brown told Sanchez to be sure to tell the members of his carpool what Brown had said. Sanchez car-pooled about 40 miles each way with some six others.

A few days before, Assistant Manager Rex McKinney told Sanchez that if there was a strike, the Company would probably hire some of the men back but not all of them, and that Sanchez (who had indicated he was not going to join the strike) would have a good chance for a year-around job.

On about September 1, Plant Superintendent Burl Smith told Sanchez that he had a good chance for year-around employment if he did not go on strike, and that if enough of them stayed in and worked, after the strike they could "petition and vote the Union out."

From the above it appears that during the period just before the strike, Respondent's top three supervisors in the plant each expressly or impliedly promised permanent employment to a new employee if he did not join the impending strike. The general manager told him to spread the word. The assistant manager threatened job loss to some of those who struck. The plant superintendent encouraged not striking so that employees could petition and vote the Union out. By these promises and this threat and by encouraging employees to petition and vote the Union out, all designed to weaken and undermine the Union and to discourage employee support for the Union and the strike, Respondent revealed its deep hostility towards the Union, and interfered with, restrained and coerced employees in the rights guaranteed in Section 7 of the Act, and thereby violated Section 8(a)(1).

During the same period, about a week before the strike, another high official, Chief Engineer Pickett, asked Employee Joe Flores if he was going out on strike or was going to stay with the Company. Flores replied he was going on strike if the majority struck. Pickett named four employees who were going to stay with the Company. Flores called over two of the named employees, who stated that they were going to strike if the majority struck. During the conversation Chief Engineer Pickett said that he hated for them to be out of a job. In expressing the wish that they would stay with the Company, Pickett said that he and (Controller and Office Manager) Bloodworth and (General Manager) Brown were trying to arrange to give them a guaranteed weekly salary of $100 or $125 if they did not go on strike. Some six employees were paid a weekly salary, and all of them were "Anglos."

Although Pickett denied some of the above testimony, by his demeanor Flores impressed me as an honest and credible witness and I credit Flores' testimony. By interrogating Flores as to whether he was going to join the strike, thereby reasonably tending to interfere with the exercise of Section 7 rights; by telling employees he hated to see them out of a job, thereby impliedly threatening them with job loss if they struck; and by telling hourly-paid employees the Company was trying to arrange to pay them a weekly salary if they did not strike; Respondent further undertook to weaken and undermine the Union and to discourage further employee support for the Union and the strike; Respondent thereby further violating Section 8(a)(1) of the Act.

About a week before the strike Supervisor Holden asked C. R. Gonzales what he was going to do. Gonzales replied that he was going to strike. Holden

replied that if he went out on strike he would not have a job any more. Holden asked him how much he was making. When Gonzales replied $1.70, Holden replied that if they had not started this union business Gonzales could be making $1.90 an hour.

About two weeks before the above conversation Supervisor Holden told Employee Hernandez that the men could still vote the Union out and that Holden would bet that if they did vote it out they would get about a 20-cent raise.

Holden's inquiry as to what Gonzales was going to do, obviously relating to the strike and so understood, reasonably tended, under all the facts of this case, to interfere with, restrain and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent thereby further violating Section 8(a)(1). Holden's remark to Hernandez was more than an expression of opinion and amounted, under all the facts of this case, to an implied promise of a raise if the Union was eliminated. By this promise, clearly designed to undermine and defeat the Union, Respondent further violated Section 8(a)(1) of the Act. In addition, Holden's remark encouraged employees to vote the Union out, Respondent thereby further interfering with the exercise of Section 7 rights and thereby further violating Section 8(a)(1) of the Act.

On about July 1, Supervisor Lattimer asked Employee Fernando Gonzales how the meeting went the night before. Without replying Gonzales walked into another room. Supervisor Lattimer followed him into the other room and said that he had asked Gonzales a question and he had not answered. Then Lattimer said that he was on Gonzales' side. They then talked for a few minutes about what benefits the employees hoped to get from the Union. Gonzales

told Supervisor Lattimer what he was earning, and that he thought it was unfair "for us being there that long and not earning a compared salary or getting compared benefits or securities like other people were getting." Gonzales was chairman of the employees' negotiating committee who assisted the union representative at the negotiations sessions. Upon the entire record it is clear that the "us" in the phrase quoted above referred to the Latin American employees, and that the "other people" referred to were the "Anglos," the word used in West Texas to cover those who were not Latin Americans or Negroes.

Under all the circumstances of this case Supervisor Lattimer's interrogation as to how the meeting when the night before, clearly referring to a union meeting and so understood, and Lattimer's pursuing the matter further and pressing for an answer, reasonably tended to interfere with, restrain, and coerce employees in the exercise of the rights guaranteed in Section 7, Respondent thereby further violating Section 8(a)(1) of the Act.

C. The Violations of Section 8(a)(5)

1. *Respondent's intent not to enter into a contract with the Union, and it's bargaining in bad faith*

Respondent's efforts and intent to undermine and weaken the Union, expressed in various ways by various supervisors, have been seen above. Its intent not to enter into a contract with the Union was revealed through remarks of its chief engineer to a group of employees, of a foreman to an employee, and through its dealings with the Union on wages, including "costs", or money, items.

1. During about the first week in August, when a group of Latin American employees went to Chief Engineer Pickett to protest the treatment of one of their number, after discussing the matter Pickett told them he knew they were for the Union and that he was dead-set against it. Two employees, Flores and Arias, credibly testified that Pickett told them that he had talked with General Manager Tom Brown (the "big boss" of Respondent's operations), and that Brown had told him that he would never sign a contract with the Union. Although Pickett admitted that he told a group of employees that he had heard that Brown was not going to sign a contract with the Union, Pickett testified that he also told the group that Brown did not tell him that.

2. On about August 23, when Respondent presented its 10-cent wage proposal orally to the employees and by letter to the Union, Foreman Bartlett told Employee Flores, according to the latter's credible, undenied, and uncontradicted testimony, that Tom Brown was going to give us a 10-cent raise even if the Union accepted it or not, that he was running that place and no damn . . . union was going to run that place . . . . "He said to hell with the Union." When Flores asked Bartlett why Bartlett was telling Flores this, Bartlett replied that "Tom Brown told me to tell you . . . he's probably mad."

Bartlett's undenied direct quotation from General Manager Brown is weighty evidence as to Brown's deep hostility and resentment toward the Union and as to Brown's intent not to bargain in good faith with the Union. In view of this undenied testimony, and as Flores and Arias impressed me as credible witnesses, I credit their testimony that Pickett told the group of employees that General Manager Brown

had told him he would never sign a contract with the Union.

3. According to credible, undenied, and credited testimony, on about July 1, Supervisor Lattimer told Employee Arias that the union "was no good." Lattimer continued, "you are a good crew-cut boy, and I think the boys will follow you. I think you are a good leader and I think you can get the boys to follow you and go to Mr. Brown and ask for the things you want; you don't need no unions." Arias replied that they had already talked to Brown several times about the things they wanted and that Brown "didn't pay us no mind." Lattimer's statements were additional evidence that Respondent was seeking to undermine and weaken the Union and sought to deal directly with the employees rather than with the Union.

4. Respondent's attitude toward the Union was early disclosed by it's treatment of two members of the employees' negotiating committee during the early months of the negotiations. There were some five employees on this committee, four of whom testified in this proceeding. The two who impressed me as the strongest characters were Fernando Gonzales, the chairman of the committee, and Joe Rogers. Both were Latin Americans. Both attended most or all of the negotiation sessions, which were held on February 1, 23, 24, March 4, 11, April 6, 7, 8, 21, 22, May 3, June 16, September 1 and December 29, 1966.

The morning after the first session, on February 2, Chief Engineer Pickett, under whom they worked, sent Gonzales and Rogers to work outside where it was "bitterly cold," under another foreman. Gonzales was kept out there for two months, the winter months of February and March. Rogers was kept

out there about three weeks. He was paid at his regular rate of pay but lost 2½ hours per day. Both of these men held inside skilled jobs running the machines that pressed the bales of cotton. They were lever pullers at $1.70 per hour. Both had worked for Respondent full-time for some twelve years. Gonzales had not been sent out on that outside job for ten years. Pickett told Rogers he was sending him outside because he needed to have a man available at all times to operate Rogers' press and Rogers would be absent some "attending meetings." Pickett knew Gonzales was on the negotiating committee because Gonzales had asked Pickett's permission to attend the first session the day before. Pickett told Gonzales he was sending Rogers outside because Rogers was a loud-mouth who claimed he could do anything. Pinkett told Gonzales he was sending him out because he knew he could do the job. The outside job, "flagging" bales of cotton, involved reading and comparing large numbers. Pickett testified that he selected Gonzales and Rogers because they were the best men with numbers. Gonzales testified his 13-year old son could do the flagging job. Pickett admitted this was the first time he had ever sent these two men out to the flagging job since he had been their supervisor in 1958. When Pickett selected these two for the flagging job he kept on the press four men none of them on the negotiating committee, and two of them younger in seniority than Gonzales and Rogers.

Pickett admitted that every year he sends some men out to do the flagging. If he selected them every year according to their capacity with numbers, the record failed to explain why he had not ever sent Gonzales and Rogers out during the seven years between 1958 and 1965, when presumably, they had

the same capacity with numbers that they allegedly had in 1966. In view of this fact, of the inconsistent reasons he gave the men and in his testimony for his actions, and as the entire record strongly indicates that Pickett was strongly antiunion, I believe and find that Pickett selected Gonzales and Rogers for the outside assignment in the bitter cold the day after the negotiating started and kept them there during the early negotiation sessions, in reprisal against the Union and in reprisal against these two men for serving on the bargaining committee, in order to weaken their resolve to help the Union in it's bargaining with the Company, and in order to weaken their sympathy and support for the Union. By this assignment of these two members of the negotiating committee at the time Respondent further displayed it's contempt for the Union and the idea of collective bargaining, discriminated against them, and further interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent thereby further violating Section 8(a)(1).

5. Respondent was represented at the negotiation sessions by three lawyers from the same law office in Fort Worth, Texas, usually one at a time. General Manager Brown, who had no intention of ever signing a contract with the Union, did not attend after the first or second session. During the negotiations Respondent's lawyers discussed the Union's proposals and presented proposals and counterproposals on behalf of Respondent. The parties discussed the usual subjects discussed in collective bargaining sessions between managements and the Unions. As time went on tentative agreements were reached on a few issues and on parts (but not all) of many issues. However, throughout the negotiations up to

September 1 each of Respondent's three lawyers took the position that Respondent was not willing to increase it's cost of doing business, and they regularly rejected as a "cost item" every union proposal which involved the paying out of money, however little. Thus, having at the third session on February 24 announced its position that it could not agree to anything that increased its cost, on that day or thereafter Respondent rejected as cost items the following and others: pay during funeral leave,[3] overtime pay after 40 hours in a week and 8 hours in a day, holiday pay, retirement, wage and shift differential pay, guaranteed time for those reporting for work, guaranteed pay for 40 hours per week, sick and accident pay, separation pay, pay for jury duty, meals and lodging for truckdrivers, vacation pay, adjusting grievances on work time, free meals for employees required to work specified long hours, furnishing of tools by the Company, a clothing allowance, a life insurance plan.

The only exception to the above is that on April 22, at the tenth bargaining session, after summarizing Respondent's position against increasing its costs, its principal attorney Mr. Price, offered two hours call-in and report-in pay, jury pay, and one paid holiday, conditioned upon the Union's acceptance of the rest of Respondent's proposals. The Union de-

[3] When Respondent rejected funeral leave pay, the Union observed that the Company was the largest cotton compress in the word, that its competition gave funeral leave, and that Respondent would not go broke. Respondent explained that Respondent's position was not a plea of poverty nor a plea that it could not afford to provide funeral leave, but that funeral leave was "simply an additional cost which the Company, in the exercise of its best business judgment, did not feel appropriate to add at this time."

clined. Then Price upped his offer to 4 hours reporting pay and two paid holidays. The Union declined. Price said he would leave his revised holiday offer open until April 27, at which time it would be withdrawn if the Union did not accept it by then.

At the first negotiation session the Union orally and in writing proposed a substantial wage increase across the board, and said that it would make a specific wage proposal later. At the second session Respondent proposed substantially the existing wage scale. The discussion during all the sessions centered more on noneconomic subjects, occasioned largely, no doubt, because of Respondent's position throughout the negotiations against any increase in its costs. At the April 21 session Respondent's Attorney Price said that, concerning economic issues, Respondent proposed to keep its costs the same and did not want to increase them on fringe benefits or wages.

There were two negotiation sessions on May 3. At the night session Respondent's attorney went through Respondent's last proposals and said that on each one this was Respondent's final offer. He indicated that the revised holiday offer was withdrawn. He said the Company would not agree to a wage increase. When the Union pointed out that it had not yet submitted any wage proposal, Respondent's attorney said, "we are willing to listen to anything you have, but our position is final . . . ." On this note the session ended.

At the next session, on June 16, Respondent presented its final position in writing. The Union spokesman then stated a number of items the Union wanted included in a contract, including a 27-cent per hour general wage increase. This was the Union's first specific wage proposal. The union spokesman pointed out that there had been no bargaining on

wages. Respondent's attorney said that the subject of wages had been bargained on and that the Company had made its position clear on all matters increasing costs. He said the Company did not want to increase its costs and in its best judgment did not feel that it could. The Union asked if the Company was pleading inability to give a wage increase. Respondent replied that "these decisions were based on uncertainties of the future, and that they just didn't have a crystal ball to look into the future."

At a June 16 union meeting after the June 16 bargaining meeting union representatives told the employees of the Company's final offer and explained the outstanding disagreements between the Union and the Company over contract terms. The union representatives stated that Respondent would not talk about some items that had been raised and which were important to the men. The union representatives also expressed the thought that Respondent did not intend ever to enter into a contract with the Union. Then upon a motion to strike on the ground the Company was not negotiating "justly," the employees present voted unanimously to strike. A week later, at another union meeting on June 23, the employees voted 99 to 1 to give the Union's bargaining committee authority to call the strike. The strike was called on September 13, 1966, a "big majority" went on strike, and the strike is still on.

During the negotiations and without first informing the Union it planned to do so and giving the Union an opportunity to bargain concerning, Respondent unilaterally give its employees a paid holiday on July 4, 1966. Respondent closed down the plant and paid the employees for the day. This was only the second time in 16 years that Respondent had given the employees July 4 off, the other time having

been in 1963. Giving this paid holiday during the beginning in 1966 without apprising the Union and giving it an opportunity to bargain concerning it, when there was no impasse in the negotiations, was reasonably calculated to undermine the Union as the bargaining agent and was a refusal to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

There having been no bargaining since June 16, on August 24 Respondent's principal attorney, Mr. Price, sent a letter to the Union reading as follows:

> The Company proposes to increase wages across the board 10¢ per hour, effective September 2, 1966.
>
> This increase is proposed without prejudice to bargaining on wages or any other subject.
>
> If you wish to meet with Company representatives concerning this proposal, please inform the undersigned.

At noon on August 24, without first giving the Union an opportunity to bargain with it concerning the proposed increase, Respondent assembled all the employees in the Company's Board of Director's room, fed them a "dinner," and talked to them about the proposed wage increase.

Almost immediately after the dinner meeting, and without first giving the Union an opportunity to bargain concerning its wage proposal, Respondent posted Price's August 24 letter on its bulletin boards.

Present at the August 25 dinner were about 150 to 200 employees, all of management, and Respondent's principal lawyer. General Manager Brown introduced Attorney Price. Price gave the assembled group a quick summation of the bargaining negotiations and stated how many issues they were in dis-

agreement on. He cited wages as one of those issues. He said that in the negotiations the Union had demanded and insisted upon a wage raise but that the Company had opposed it because of the uncertainties of business prospects. He said that since the last negotiation session the Company had closed its books on June 30 and had had an opportunity to look into future business prospects, which it thought would be good and would warrant a wage increase. He said the Company was going to propose to the Union a wage increase of 10 cents an hour, that the Company and the Union would have to discuss it and see whether they agreed on an increase and if so in what amount. Then Price described to them their individual rights in the event of a strike.

Several General Counsel witnesses attributed to Brown the statements that he would grant a wage increase regardless of what the Union wanted, that "to hell with the Union," that he was running the business. Several Respondent witnesses denied this. It seems unlikely to me that Brown would have talked as loosely as this to his assembled employees upon such an occasion, even though he talked this way to at least two supervisors under him, Picket and Bartlett, and they repeated it to employees, as has been seen above. It seems probable to me, and I find, that the employees were mistaken in remembering that they heard these sentiments expressed at the August 24 meeting.

The day after the dinner meeting, on August 25, the Union's district director, Thomas, wrote Attorney Price acknowledging receipt of his letter, protesting Respondent's having met with the employees and proposing a wage increase to them without first making the proposal to the Union. The letter said, "You are aware the Law does not permit an em-

ployer to bargain individually with its employees in derrogation of its duties to bargain with the certified collective bargaining agent." The Union offered to meet with Respondent on August 30, 31, and September 1 "to bargain on wages and other conditions of employment."

Respondent and the Union met again on September 1. Respondent's Attorney Bennett opened the meeting with the observation that he assumed the Union was here to talk about the proposed wage increase. The Union's district director, Thomas, replied that the Union was prepared to talk about wages and other subjects. Bennett said that he understood the Union had rejected the Company's wage proposal which it proposed to put into effect the following day, September 2. Thomas then read his August 25 letter to Price. Bennett asked if the Union rejected the 10 cents. Thomas replied that the Union had previously proposed a 27 cents an hour wage increase and that it proposed that a 27 cents increase be put into effect September 2. Bennett then said the Company doesn't feel it can go more than 10 cents because it does not know what the future holds. When Thomas observed that in previous sessions the Company had claimed that it could not afford any increase, Bennett replied that in previous sessions the Company did not feel it could pay any more, but that after taking a "long-range look into the future" it felt it could go 10 cents. Thomas said he did not agree with the 10 cents but that the Union was flexible on 27 cents. Thomas then enumerated as still in dispute, among other items, holiday pay, sick pay, funeral pay, guaranteed work week, arbitration and grievance procedures, seniority and job posting, paid hospitalization, paid vacations. Respondent had nothing to say on these items. To be

noted is that throughout the negotiations Respondent had rejected most of these items as "cost" items. The meeting adjourned with the Union telling the Company that it would present the Company's position to the employees.

Before the Company had a chance to hear further from the Union concerning the reaction of the employees, and with no impasse having been reached, Respondent, without further notice to the Union, put the 10-cent wage increase into effect on September 2.

It appears clear from all of the above, and I find, that Respondent made its 10-cent wage offer not with an intent to negotiate a collective agreement with the Union that would include an agreed-upon wage increase and agreed-upon other items theretofore consistently rejected as "cost items." Rather the evidence proves that Respondent's wage offer was a device to ensure that there would be no meaningful negotiation on wages and no contract, and that the increase would go into effect without a contract, thereby undermining and defeating the Union as the bargaining agent in the plant. This was the Company's first and only wage offer since the negotiations had begun on February 1, some 7 months before. It was made as a crescendo towards a strike was building up in the plant, as Respondent well knew, and was a strike-prevention measure. If it had been a sincere wage offer for collective-bargaining purposes no reason appears why Respondent set an effective date of only a week after the offer was made or why in its offer it set an effective date at all. If it had been a bona fide wage offer designed to further and not to defeat collective bargaining and the Union as a bargaining agent, no reason appears why Respondent did not present the offer to

the Union prior to staging a "dinner" and presenting it directly to the employees, and no reason appears as to why the Respondent found it necessary to present the offer to the employees at all.

Clearly no impasse had been reached prior to the September second effective date of the raise. Having given the employees a paid holiday July 4 without first mentioning it to the Union, and thereby preparing them for future unilateral action, a few weeks later it announced its intended wage increase to the employees publicly before negotiating with the Union, thereby putting intensive pressure upon the Union to accept the "proposal." Further, by proposing an effective date a week later Respondent was trying to establish in advance when an impasse would be reached. A week was much too short a time to allow the Union to consider this first wage offer in 7 months and its impact upon the always rejected "cost" items. Giving the Union so short a time to consider this "proposal" was in itself an element of bad faith and was proof that no impasse in good-faith negotiations could occur. There can be no impasse without good-faith bargaining.

Further, the record proved that Respondent went to the September 1 session with the Union with a "take-it-or-leave-it" attitude and with no intent to negotiate an agreement with the Union and no intent to bargain concerning the numerous "cost items" which it had rejected throughout the negotiations for alleged business reasons. Now that business reasons allegedly permitted upping its costs, Respondent had a duty which it never fulfilled, to bargain meaningfully with the Union concerning these "cost items."

Upon the preponderance of the evidence in the entire record considered as a whole I conclude and find that Respondent never bargained in good faith

with the Union concerning wages and "cost items," that the September 2 wage increase was made unilaterally during negotiations when no impasse in the negotiations had been reached, and that by this bad-faith bargaining and by this unilateral wage increase Respondent refused and now refuses to bargain in good faith with the Union, Respondent thereby violating Section 8(a)(5) and (1) of the Act.

2. *The Refusal to bargain on racial discrimination practices*

a. Concerning not paying lower paid employees at higher rates while performing higher jobs

In addition to refusing to bargain in good faith concerning economic matters, Respondent also refused to bargain in good faith with the Union concerning the elimination of discriminatory racial practices going on in the plant. Respondent bargained with the Union on the inclusion of a nondiscrimination clause in the contract, while simultaneously refusing to bargain meaningfully and in depth concerning actual racial discrimination practices then going on. After much discussion at several conferences, Respondent finally agreed to include a nondiscrimination clause in a contract. However, it never would accept arbitration as the final step of the grievance procedure. It held out for the plant manager's decision being final on all grievances. Late in the negotiations, it expressed willingness to permit a party aggrieved by the plant manager's decision to go to civil court if he felt the contract had been breached, or to strike with limitations. This meant that on grievances involving the elimination of practices involving racial discrimina-

tion the plant manager's decision was to be final, subject to the right to go to court for breach of contract, or to strike giving the Company notice of its intent to strike within 10 days of its receipt of the general manager's decision and actually commencing the strike within 30 days.

Expressed willingness to enter into a nondiscrimination clause so robbed of significance by the grievance machinery was scarcely a substitute for bargaining with the Union on racial grievances actually raised during the bargaining conferences. In fact Respondent's cavalier treatment of the grievances made a mockery of its alleged willingness to enter into a nondiscrimination clause at all.

There can be no doubt on this record but that Respondent accepts and shares whatever attitudes and assumptions prevail in West Texas towards Latins and Negroes. Although the matter was not mentioned during the negotiations, the manner in which Respondent takes its employees on fishing trips reveals the accuracy of the sentence just above. The record suggests that the fishing trips are an annual affair. The employees are broken into three groups. First, Respondent takes office personnel and Anglo employees and their wives on a fishing trip; next it takes Anglo employees who do not wish to take along their wives; next it takes Latin and Negro employees without their wives. In 1965 and 1966 the Anglo trips were to a point about 700 miles away and lasted the best part of a week; the Latin-Negro trips were to a point about 300 miles away and lasted no more than 3 or 4 days. Respondent paid for transportation, meals and lodging. Salaried personnel were not docked for worktime on the trips, but the record does not show that hourly-paid employees were paid for work time spent on the trips.

All of the Union's negotiating committee, including its field representative and the employees' committee were members of minority races, a fact which could not have escaped Respondent's negotiators. Field Representative Marion G. Ramon, Fernando Gonzales, Joe Rogers, and Jesse Ruiz all indicated by their testimony that they were regarded in the area as Latin-Americans. All were on the negotiating committee except Jessie Ruiz, whose brother Steve Ruiz was on it. Charlie Ray Powell is a Negro. Although there is no specific testimony about Bartola Esparanza's race, it is a fair conclusion in all the circumstances that he is a Latin. An answer of Jessie Ruiz reflected the inner conflict under which a Latin in the area labors. He was born in the United States and has spent all his life in and around West Texas. Asked his race he replied, "Well, I am a white just as much as anybody else, I would guess, but I am considered as Latin-American." He later testified that of the three commonly known races in the West Texas area, Negro, Latin-American, and White, he is Latin-American.

The great sense of inferiority of the "Mexican" in the area, which could not have escaped Respondent's skilled and sophisticated negotiators at the bargaining table, was shown by answers on cross-examination of the chairman of the negotiating committee, Fernando Gonzales. Although by his demeanor he impressed me as one of the natural leaders of the Latin group of employees, an impression corroborated by his selection as chairman of the negotiating committee, he was not inclined to stand up for his rights when, the morning after the first bargaining session, which he had attended, he was sent out into the cold to perform the "flagging" job. Asked on cross-examination if he asked why he was being sent out there,

Gonzales replied, "You don't ask questions there, sir; you just only do what you are told." Later he explained that "I didn't challenge the Company. I told the Union representative what had occurred with me, with me and Mr. Rogers, but I never did challenge the Company at the time I was told, and I repeat, you don't ask anything. If you are assigned to do a job, you just get out and try to do a job as you are told to do so."

This same sense of inferiority and docility on the part of the "Mexican" group was further disclosed through the testimony of Polo Arias, whose testimony, appearance and demeanor indicated that he is a Latin-American. Arias was removed from a lever pulling job to a job on which he worked fewer hours and therefore lost income. He testified on cross-examination that he did not ask why he was removed, that "in a company like that you don't ask questions, you just do what they tell you." Elaborating, a little later he repeated the substance of this answer, and added: . . . I am a grown man and I know, you know, what you are supposed to do and what you are not supposed to do, even if you have got the right to do it." He added that he knew he would not gain anything by asking.

In view of the racial sensitivities in the plant, which Respondent's officers and supervisors in the plant obviously knew well, bargaining in good faith by Respondent meant that Respondent must bargain in depth and meaningfully concerning any and all racial questions which were alluded to by the union negotiators during the bargaining. Respondent's duty was and is to discuss with an open mind conditions as they actually exist in the plant, including racial conditions and any racial discrimination. The Board's role is not to require the elimination of ra-

cial discrimination, but to require good-faith bargaining on this condition of employment, as well as on all other wages, hours and conditions of employment.

Employees were assigned to crews under a foreman and somehow, at some point were frozen into a classification in a more or less specific job at a low wage. Most of the jobs paid $1.50 or $1.60 per hour. However, all, or most, of the employees were subject to being transferred to other jobs under other foremen for longer or shorter periods of a few hours to several weeks. They continued getting paid at their classification regardless of whether the job they were performing was in a higher or lower paying classification. These transfers gave many employees training on other jobs than their own, and whetted their appetite for a better, higher paying job. There were no announced standards for selecting an employee for a higher paying job than the work he was regularly on, nor was there any time limit for performing the higher job after which he would be considered to be in the higher classification and begin to draw the higher pay. As appears below, the Union's proposals were designed to change these conditions, and Respondent's positions were designed to retain them.

Jesse Ruiz has worked for Respondent since 1961. In 1964, he served as an off-bearer, moving bales of cotton on a 2-wheeled vehicle with handles. He has not worked as an off-bearer on a regular basis since 1964. He served primarily as a weigher during the busy season from early August 1965 until his layoff in early March 1966. During this period of 7 months, he was paid only $1.50 an hour, which was the rate the Company paid those working on the band table, where Ruiz worked just before he began working

regularly as a weigher. That he was considered as a weigher for the group with which he was working was shown not only by his undenied testimony to that effect but also by the fact that if there was some weighing to be done when he was temporarily working at something else, it was the foreman of the group, and not some other employee, who substituted for him at the scale.

During the 7 months Ruiz served as a weigher at $1.50, there were five or six other weighers, all of whom received $1.80 an hour for performing virtually the same job he performed. They were weighing the cotton when it came into the warehouses and he was weighing it as it was getting ready to go out; but whatever difference there was between the two places in duties and responsibilities was not recognized in the classification scale, for Respondent had only the classification of weigher, and not of reweigher.

Of the five or six other weighers during this 7-month period, one was a Latin-American, all the others Anglos. This Latin, Pedro Aguirre, had somehow gotten up to $1.80 an hour classification. He was listed as a weigher at $1.80 an hour on a list of employees dated February 1, 1966, which Respondent gave to the Union at the first bargaining session on that day. On a list dated February 24, 1966, which Respondent supplied to the Union, Aguirre was classified as a proof checker. Proof checkers were also paid $1.80, Respondent's highest wage. Aguirre had reached the top wage, and he was transferred laterally at the same wage.

According to Respondent's lists, of 200 employees on February 1, and of 117 employees on February 24, on both dates only some 16 employees were classified in jobs paying $1.80. Of these 16 employees,

only 3 of them bore names suggesting they were Latins—Aguirre, Vídourre, and Garza. One name was added on the February 24 list. The remaining 14 names appear to have been Anglos, although there was no proof that some of them were not Latin or Negro. These names were Duckett, James Horne, Floyd Johnson, Burt Long, Marvin Lehr, Alvie Melton, Saunders, Temple Sparks, Smith, Carnes, Jerry McAda, Terry McAda, Wilhite, Beddingfield. It is inconceivable on this record that many of these top paying jobs were held by Latin or Negroes. On the entire record I conclude only that most of the $1.80 men were Anglos and that the $1.80 jobs were considered by the Latin group as Anglo jobs. They were coveted by the Latin group because they paid more money.

In September 1965, Jesse Ruiz spoke to his foreman about getting more money since he was receiving $1.50 an hour and other weighers received $1.80. His foreman never spoke to him about raising his wages, but instead threw him a bone; he permitted Ruiz to work an extra hour per week, for which he received an extra $1.50. During the 7 months Ruiz was put on the scale as a weigher, he was given other duties, including off-bearing when there was no weighing to be done. As has been seen above, it was Respondent's custom to use men on different jobs, and this practice presumably included the other weighers who were receiving $1.80 an hour.

Ruiz convincingly testified on cross-examination that between August 1965 and January 1966, when he was weighing, no supervisor knew that he was a union man.

It is clear on this record, and I conclude, that the only reason Respondent paid Ruiz $1.50 an hour for 7 months while he was doing a $1.80 job which five

or six Anglos were concurrently paid $1.80 for performing, was because Respondent considered Ruiz and the other minority employees as docile, cheap, labor, and in order to keep them in this condition of servitude. This was the rankest kind of racial discrimination.

When the Union presented this Ruiz situation to Respondent's attorneys at the bargaining table, Respondent's first reply was that Ruiz was possibly not qualified. When the Union replied that Ruiz was doing the job without any instructions, Respondent's attorney replied he would check into it. At the next session the attorney said Ruiz was misclassified on a list of employees Respondent had previously given the Union, where Ruiz was classified as a weigher. At this session Ruiz gave the Union another list of employees on which Ruiz' classification was listed as "lift truck clamps." Ruiz' name was crossed off for this classification and his name was handwritten in under the classification as "off-bearer." As has been seen above Ruiz had not worked regularly as an off-bearer since 1964. By the April 7 bargaining conference, Ruiz had been laid off. At that conference the Union pointed out that since the Union's protest in February, Ruiz had continued weighing at the same wage and that the only change in his status was on the classification list, not in his wages. Respondent's negotiator replied that since Ruiz was laid off there was nothing they could do about his situation. When on June 16, the Union asked if the Company was going to continue its practice of paying different rates to different employees performing the same job, because of race, Respondent replied that it knew of no such discrimination.

The discussions about Ruiz arose in connection with the Union's efforts in the negotiations to get

Respondent to change its practice of using employees in higher classifications and not paying them for it. The Union sought the higher pay for all hours worked in the higher classification. The Union also sought to have employees moved up to higher classifications by seniority and to have them paid in the higher classifications as of the date they began work in those classifications. The Union also sought posting of all jobs opening up for 7 days or longer, and bidding by employees interested. These subjects at base involved racial discrimination, as Respondent well knew, and as those in the plant well knew concerning the Jesse Ruiz situation for 7 months. If Respondent's negotiators had made a real investigation concerning Ruiz in the plant, they would have discovered the racial overtones involved.

Respondent consistently refused to agree to pay the higher rates on temporary transfers, consistently refused any meaningful bargaining on seniority as it related to higher classification rights of employees, and consistently refused to agree on job posting and bidding. Respondent's constant position on all these matters was that qualifications should govern and that Respondent shall be the judge of qualifications. Although Respondent was willing to let seniority govern where two were equally qualified, here also Respondent was to be the sole judge of qualifications. Respondent gave no meaningful reasons for its positions on these issues. The basic reasons were that the Union's proposals challenged the status quo which protected the practice of racial discrimination, and Respondent did not intend to change that practice.

Upon the above considerations and the preponderance of the evidence in the entire record considered as a whole, I believe and hold that Respondent negotiated as it did considering not paying employees

the higher rates of jobs they are told to perform, and refused to pay Jesse Ruiz $1.80 an hour for 7 months while he was performing a job classified and paying $1.80, because it considered Latin and Negro employees as docile, cheap, labor, and intended to keep them in this condition of servitude; Respondent thereby refusing to bargain in good faith concerning the elimination of existing racial discrimination in the plant and thereby further violating Secton 8(a)(5) and (1) of the Act.

b. Concerning regular overtime on the sprinkler system

Respondent's four warehouses are equipped with a sprinkler system for fire protection. Prior to 3 years ago it had seven fireguard stations, and nights and weekends used employees on an overtime basis as fireguards or watchers. All three racial groups were given the overtime on a random basis; apparently there was work for all those who wanted the additional income. About 3 years ago Respondent installed an electric alarm system with a panel alarm in the office, and thereafter used only two fireguards on nights and weekends. The two worked on a regular overtime basis nights and weekends. These two guards are Charles Speegle and D. D. Chambers, both Anglos and both regular employees with the Company during the day.

Some time "awhile back" Latin Joe Rogers asked his foreman if he could fire watch on Saturdays and Sundays, adding that Rogers needed the money. The foreman said he would look into it. The foreman never mentioned it further, and, consistent with the docility that goes with the prevailing sense of inferiority, neither did Rogers. Rogers had had no

overtime on the sprinklers in the last 3 years, although for years prior to that, he shared with others the overtime pay.

The Union's original proposal included this clause:

"There shall be established equal distribution of all work hours." At several sessions Respondent took a solid position against this proposal on several grounds. Then twice during the later negotiations the Union, through Latin Rogers, asked that Latins and Negroes be given some of the regular overtime on the sprinkler panel watch in the office. The first time the Company's negotiator questioned whether there was any *regular* overtime. The next time the question arose, Respondent said it thought the two Anglos who performed this work, Chambers and Speegle, were the most qualified to do it. When, on June 16, the Union asked if the Company was going to continue racial discrimination on distribution of overtime hours, Respondent replied that it knew of no such discrimination.

The record did not establish that Chambers and Speegle were any more qualified as firewatchers, or any more responsible as individuals, than some of the Latin Americans who appeared before me. The firewatchers had to be alert during their watch for any signal that would indicate a fire or that the sprinkler system had been tripped and was sprinkling water on the cotton. When a signal was given, the alarm box in the office indicated which warehouse was involved and called the fire department. The firewatcher was expected to go to the area indicated and do what was necessary. If there was no fire and the sprinklers were running by accident, the guard had to shut them off.

There was much testimony, in connection with an-

other subject, as to the qualifications, or lack of qualification, of a number of Latins who were "lever pullers," to set up the sprinkler system after a valve had been tripped and the sprinklers were playing. These men were skilled enough and trustworthy enough to run the expensive presses which compress the cotton, and they have, from time to time, assisted Engineer Pickett through the years in repairing the sprinkler system and setting it up. It was not shown that Chambers or Seegle had any experience along these lines or were as qualified as firewatchers as the Latins. In fact Rogers credibly testified that prior to the strike Chambers and Speegle could not set a valve. In addition Speegle had the handicap of a seeming illness which could have detracted from his effectiveness as a firewatcher.

Respondent having during the negotiations told the Union that the Anglos got the overtime on the sprinklers because they were better qualified, at the hearing Respondent's foreman over the firewatchers testified that the reason no Latins or Negroes have done any panel watching in the last 3 years was because they did not ask to. As has been seen above, Joe Rogers asked to. Contrary to the fact Respondent's foreman testified that Respondent's practice in selecting firewatchers had not changed. At the hearing Engineer Pickett testified that most of the lever pullers lived in Slayton, Texas, some 20 miles from Lubbock; as though this was a reason why they get no overtime work on the sprinklers. In view of Respondent's self-contradictory statements given to the Union and given in the testimony, as seen above, and as Chambers and Speegle were not proven to be more qualified as firewatchers than the Latins, particularly the Latin lever pullers, who had previously done some of the overtime, I find that in cutting the

Latins off from any of the regular overtime work as firewatchers during the last 3 years, and instead giving it all to two Anglos, Respondent engaged in racial discrimination against the Latins. It is clear that Respondent did not bargain in good faith with the Union concerning this racial discrimination. Telling the Union, in successive sessions, that it doubted that Respondent had any regular overtime hours, when Rogers and probably every employee member of the negotiating committee knew to the contrary; that Chambers and Speegel were the most qualified when Rogers and Fernando Gonzales knew they were not; and that Respondent knew of no racial discrimination concerning distribution of overtime on the sprinklers; shows an effort or willingness to conceal and no effort to engage in meaningful bargaining towards the elimination of racial discrimination. Upon these considerations and upon the preponderance of the evidence in the entire record considered as a whole I hold that by refusing to bargain with the Union in good faith concerning the elimination of racial discrimination with respect to the distribution of regular overtime on the sprinklers, Respondent further violated and is violating Section 8(a)(5) and (1) of the Act.

The General Counsel urged refusal to bargain over the elimination of other racial discriminations in the plant. In my considered judgment the General Counsel's proof was lacking on these additional matters.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to

trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Respondent having refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, I recommend that Respondent, upon request, bargain collectively with the Union as the exclusive representative of its employees in the unit set forth herein concerning wages, hours, and other terms and conditions of employment including the elimination of discriminatory racial practices within the plant, and if an understanding is reached, embody such understanding in a signed agreement.

As to the causes of the strike, all the evidence on this subject proved that the strike was caused by Respondent's unfair labor practices and that it was an unfair labor practice strike. Thus, on June 16, the union representative reported to the employees Respondent's final position, and informed them that there were many items Respondent would not talk about, including some having to do with racial discrimination. The union representative also reported to the employees that he did not think the Company ever intended to enter into a contract because a lot of these items were items common in contracts. The employees then voted unanimously in favor of a strike because the Company was not negotiating "justly."

A week later by secret ballot the employees approved by a vote of 99 to 1 a resolution authorizing the bargaining committee to call a strike.

The bargaining committee did not call the strike until September 13. In the meantime Respondent had unlawfully interrogated, threatened, and promised the employees because of their union activities in an effort to undermine the Union's bargaining power and its capacity to mount a successful strike. In the meantime, also, Respondent had engaged in unlawful, unilateral activity concerning the July 4 holiday, and the September 2 wage increase. It is clear that all of these unfair labor practices contributed to the calling of and the timing of the strike, and that the strike was therefore caused by the unfair labor practices.

I recommend the affirmative relief customarily ordered in unfair labor practice strikes. I recommend that upon their unconditional application to return to work, Respondent offer immediate and full reinstatement to their former or substantially equivalent position to all those employees who went on strike on September 13, 1966, without prejudice to their seniority or other rights and privileges, discharging, if necessary, all persons hired on or after that day in order to provide work for the strikers. I recommend also that Respondent make whole all of such strikers for any loss of pay suffered by reason of Respondent's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which he normally would have earned, less his net earnings, during the period from 5 days after the date on which he applies or has applied for reinstatement to the date of the Respondent's offer of reinstatement. Any such net earnings shall be computed on a quarterly basis in the manner established

by the Board in *F. W. Woolworth, Co.*, 90 NLRB 289, 291-294. Interest shall be added at the rate of 6 percent per annum in accordance with the decision of the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

As Joe Rogers lost 2½ hours' pay for each day he was unlawfully on the "flagging" job, and as Fernando Gonzales may have lost the same amount of pay, I shall recommend that Respondent make whole Rogers and Gonzales for any loss of wages suffered by them because of this assignment to the flagging job by payment to each of them of an amount equal to that which he would have earned as wages had two other employees instead of them been assigned to their job and had they continued in their regular functions as lever pullers. Interest shall be added at the rate of 6 percent per annum in accord with the *Isis* case, *supra*.

In view of the fact that the unfair labor practices committed are of a character striking at the root of employee rights safeguarded by the Act, I recommend that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the foregoing findings and upon the preponderance of the evidence in the entire record, I make the following:

Conclusions of Law

1. Farmers' Cooperative Compress, of Lubbock, Texas, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Packinghouse, Food and Allied Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By promising employees permanent employment for not going on strike, by threatening loss of jobs for going on strike, by encouraging employees to petition and vote the Union out, by interrogating employees concerning their union activities and their intentions about joining or not joining the strike, by promising a raise if the Union is eliminated, and by other acts, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By refusing to bargain in good faith with the Union concerning wages, hours and working conditions, including the condition of racial discrimination, and by unilaterally changing wages, hours and working conditions on July 4 and September 2, 1966, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the preponderance of the evidence in the entire record in the case considered as a whole, I recommend that Farmers' Cooperative Compress, of Lubbock, Texas, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Promising employees permanent employment for not going on strike;

(b) Threatening employees with loss of jobs if they go on strike;

(c) Encouraging employees to petition and vote the Union out;

(d) Interrogating employees concerning their union activities and their intentions about joining or not joining a strike;

(e) Promising employees a raise if the Union is eliminated;

(f) Assigning members of the Union's negotiating committee to undesirable positions in reprisal against them and the Union for their assistance to the Union.

(g) Refusing to bargain in good faith with the Union concerning wages, hours and working conditions, including the condition of racial discrimination;

(h) Unilaterally changing wages, hours and working conditions without giving the Union an opportunity to bargain concerning them;

(i) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist United Packinghouse, Food and Allied Workers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or do refrain from any and all such activities.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Packinghouse, Food and Allied Workers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit, with respect to rates of pay, wages, hours of employment, and other

conditions of employment including the condition of racial discrimination, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer reinstatement to, and make whole, the striking employees for any loss of pay they may have suffered or may suffer in the future by reason of the discrimination practiced against them, in accordance with the recommendations set forth in "The Remedy" herein;

(c) Make whole Joe Rogers and Fernando Gonzales in accordance with the recommendations set forth in "The Remedy" herein.

(d) Post at its plant and warehouses in Lubbock, Texas, copies of the notice attached hereto marked "Appendix."[4] Copies of said notice, to be furnished by the Regional Director for the Board's Sixteenth Region (Fort Worth, Texas), shall, after being signed by the Respondent's representative, be posted by Respondent and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

---

[4] If these recommendations are adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

(e) Notify the Regional Director for the Sixteenth Region, in writing within ten (10) days from the date of this Decision and Recommended Order, what steps Respondent has taken to comply herewith.[5]

Dated at Washington, D. C.

/s/ Alba B. Martin
Alba B. Martin
Trial Examiner

[5] If these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Sixteenth Region, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

Form NLRB 4635A
(11-65) TXD-367-67

NOTICE TO ALL EMPLOYEES

PURSUANT TO

the recommended order of a Trial Examiner of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(as amended)

we hereby notify our employees that:

WE WILL NOT promise employees permanent employment if they do not go on strike.

WE WILL NOT threaten employees with loss of their jobs if they go on strike.

WE WILL NOT encourage employees to petition and vote UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, out of the plant.

WE WILL NOT unlawfully ask questions of employees concerning their union activities and their intentions about joining or not joining a strike.

WE WILL NOT promise employees a raise if the above-named Union, or any other Union, is eliminated from our plant.

WE WILL NOT assign members of the Union's

negotiating committee to undesirable positions because they are assisting the Union.

WE WILL NOT refuse to bargain in good faith with UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, concerning wages, hours and working conditions, including the condition of racial discrimination in the plant.

WE WILL NOT unilaterally change wages, hours and working conditions without giving the Union an opportunity to bargain concerning them.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer reinstatement to, and make whole, the striking employees for any loss of pay they may have suffered or may suffer in the future by reason of any discrimination practiced against them, in accordance with the Recommended Order of the Trial Examiner.

WE WILL make whole Joe Rogers and Fernando Gonzales in accordance with the Recommended Order of the Trial Examiner.

WE WILL bargain collectively, upon request, with UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, as the exclusive representative of all employees in the bargaining

unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment including the condition of racial discrimination, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees at our compress and warehouses, exclusive of clerical employees, technical and professional employees, guards and supervisors as defined in the National Labor Relations Act.

All our employees have the right to form, join, or assist any labor union or not to do so.

FARMERS' COOPERATIVE COMPRESS
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 8A24 Federal Office Building 819 Taylor Street, Fort Worth, Texas 76102 (Tel. No. 334-2921).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 361817 147

LIBRARY
SUPREME COURT, U. S.
SEP 10 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 448

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

FARMERS' COOPERATIVE COMPRESS,
Intervenor.

FARMERS' COOPERATIVE COMPRESS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
ROBERT H. NICHOLS,
RUSSELL WOODY,
105 West Adams Street,
Chicago, Illinois 60603,

MICHAEL H. GOTTESMAN,
1001 Connecticut Avenue, N. W.,
Washington, D. C.,
Attorneys for Respondent United Packinghouse, Food and Allied Workers International Union, AFL-CIO.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 448.

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

FARMERS' COOPERATIVE COMPRESS,
Intervenor.

FARMERS' COOPERATIVE COMPRESS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO,
Intervenor.[1]

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

---

1. The caption follows the caption adopted by petitioner in its petition filed herein which reflects the alignment of the parties in the Court of Appeals for the District of Columbia Circuit. It is obviously not in compliance with Supreme Court Rule 21(6), which would call for the designation of Farmers' Cooperative Compress as petitioner and all other parties as respondents. However, in the interest of avoiding confusion, the caption displayed on the petition has been duplicated. United Packinghouse, Food and Allied Workers International Union, AFL-CIO is proceeding, of course, as a respondent, although not designated in the petition as such.

OPINIONS BELOW.

Petitioner has accurately reported the citation to the decision and order of the National Labor Relations Board and is correct in stating that the opinion of the Court of Appeals for the District of Columbia Circuit is unreported.

However, petitioner's Appendix A (petition, pp. 8-9) which purports to be the decision of the National Labor Relations Board is grossly inaccurate. That portion found under the heading "Trial Examiner's Findings and Conclusions" is nothing more than an abbreviated summary of the decision and recommended order of the trial examiner,[2] apparently authored by the staff of Commerce Clearing House, Inc.,[3] and thereafter further reduced by counsel for petitioner. It should in no manner be construed as accurately reflecting any portion of the trial examiner's decision and recommended order. The representation on page 9 of the petition to the effect that "[t]he Trial Examiner's findings and conclusions are adopted" by the National Labor Relations Board, is also inaccurate. In fact, the National Labor Relations Board, at least in partial response to the exceptions of petitioner, both corrected and disregarded certain findings of the trial examiner, declined to rely on certain of his conclusions, and additionally, declined to adopt one of his recommendations. Petitioner's Appendix A wholly fails to comply with this Court's Rule 23(1)(a) and (i) by neglecting to include the opinions of the administrative agency involved.[4]

---

2. In point of fact the findings and conclusions of the trial examiner consume eighteen pages of legal size paper.

3. *Farmers' Cooperative Compress and United Packinghouse, Food and Allied Workers, AFL-CIO*, 1968-1 CCH NLRB para. 22,075.

4. The Decision and Order of the National Labor Relations Board and the Decision and Recommended Order of the Trial Examiner are accurately set forth at pages 42-44 and 17-39 of the

Moreover, petitioner's Appendix B, which purports to set forth the opinion of the Court of Appeals for the District of Columbia Circuit in its entirety, is also, by virtue of certain exclusions therefrom, grossly inaccurate. Omitted therefrom are a portion of a paragraph dealing with the court's disposition of the cause (petition, p. 12) and an entire footnote setting forth the court's reasoning for remanding the cause to the National Labor Relations Board for further evidentiary proceedings. Accordingly, we have reproduced the entire paragraph from which a portion is missing in the petition and the deleted footnote as Appendix A hereto (*infra*, pp. 9-10).

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit which petitioner has set forth in its Appendix C cannot be the judgment of that court which is sought to be reviewed here as that judgment was subsequently vacated by the court on March 19, 1969. Presumably, petitioner seeks review of the final judgment of the court, entered on March 19, 1969, which is reproduced herein as Appendix B (*infra*, pp. 11-13).

The order of the Court of Appeals for the District of Columbia Circuit entered May 12, 1969, denying petitioner's petition for rehearing, which order was accompanied by a separate statement of Senior Circuit Judge Danaher as to why he voted against rehearing, is also unreported. That order and statement are faithfully reproduced in the petition as Appendix D thereto (pp. 31-32).

The jurisdictional allegation is adequately set forth in the petition.

Joint Appendix transmitted to this Court as part of the record before the Court of Appeals. Moreover, conversations with counsel for the Board indicate that it will independently reproduce those decisions as appendices to its Brief in Opposition.

QUESTION PRESENTED.

Whether the order of the Court of Appeals for the District of Columbia Circuit remanding the cause to the National Labor Relations Board for further evidentiary proceedings, which order in no way operates against the petitioner, is ripe for review by this Court? Alternatively, is it not the case that review of such an order would be premature and should properly await an affirmative finding that there has been a violation of the Act?[5]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

These are adequately set forth in the petition.

STATEMENT OF FACTS.

The statement of facts contained in the petition in large measure is adequate.

The United States Court of Appeals for the District of Columbia Circuit on February 7, 1969, found the petitioner in violation of sections 8(a)(1) and 8(a)(5) of the Act and enforced the Board's order in this regard. Those violations are not here contested by petitioner. In addition, the court concluded that a policy and practice of an employer of invidious discrimination on account of race or national origin could be a violation of Section 8(a)(1) of the Act. The court, however, declined to hold that petitioner had committed such a violation of the Act and instead remanded the case to the Board for further evidentiary proceedings in order to determine whether petitioner had such a policy in fact. Thereafter, as noted by petitioner, its petition for rehearing was denied.

---

5. The Labor Management Relations Act, 29 U. S. C. A. Section 141 *et seq.*

REASON FOR DENYING THE WRIT.

I.

The Question Presented for Review by Petitioner Is Prematurely Brought to This Court.

As noted above, the specific unfair labor practices which petitioner has been found to have committed are not here questioned. What petitioner seeks to question is the holding of the court that an employer's policy and practice of invidious discrimination against its employees on account of race or national origin, when established in certain ways, constitutes a violation of Section 8(a)(1) of the Act. Discussion concerning this holding was set forth by the court for the purpose of indicating guidelines against which evidence developed on remand was to be measured. The court expressly refused to find petitioner in violation of Section 8(a)(1) of the Act on the basis of its discriminatory practices as shown in the record and thought "that in fairness to the company it should have an opportunity to have the matter more fully litigated . . ." (Appendix A *infra*, p. 9). Thus, what petitioner seeks to do here is to set aside the guidelines enunciated by a court in conjunction with a remand, which, of course, is a well-established and frequent practice of courts, *before* it has been determined that petitioner is in any way in violation of those guidelines.

Elemental considerations of judicial economy strongly support the propriety of the Court of Appeals' order. That order does not find petitioner in violation of Section 8(a)(1); rather, it simply remands the cause for the further taking of evidence. If and when petitioner is found to have violated Section 8(a)(1) of the Act by virtue of a policy of racial and national origin discrimination, then at that time appropriate review could be had.

Our failure to comment on the merits of the principal question raised by petitioner should not be construed as agreement that the Court of Appeals' "reasoning is neither convincing nor supported by legal precedent" (petition, p. 5). Actually, the decision of the Court of Appeals is an exceedingly thorough and well-reasoned one as even a casual reading of it demonstrates. It is also amply supported by precedent both of the courts and of the Board, which precedent is cited in Judge Wright's opinion, recognizing the debilitating effect of racial discrimination in the labor-management relatonship. In our view the opinion does not require independent support.[6]

In summary, we simply urge that consideration of the question at this time is clearly premature.

---

6. Petitioner also urges a second question upon this Court, which question has to do with whether certain issues were properly before the Court of Appeals. Petitioner concluded his discussion on this point by asserting that they were (petition, p. 6). This is apparently an error on the part of counsel for it seems clear that he intended to assert the negative of that proposition, namely, that such questions were not properly before the court. In any event, the court below adequately responded to this contention.

CONCLUSION.

For the reasons stated we respectfully request that this Court deny a Writ of Certiorari to review the judgment of Court of Appeals for the District of Columbia Circuit entered in this case.

Respectfully submitted,

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
ROBERT H. NICHOLS,
RUSSELL WOODY,
105 West Adams Street,
Chicago, Illinois 60603,

MICHAEL H. GOTTESMAN,
1001 Connecticut Avenue, N. W.,
Washington, D. C.,
Attorneys for Respondent United Packinghouse, Food and Allied Workers International Union, AFL-CIO.

APPENDIX A.

Full paragraph from which a portion was deleted in Petitioner's Appendix B:

We affirm the Board's order against the company. The particulars of the labor dispute, the unfair labor practices, and the basis for our enforcement of the Board's order are set out in Parts I and II of this opinion. In addition, without staying the enforcement of that order, in Part III we remand the case to the Board for a hearing on whether the company has a policy and practice of discrimination against its employees on account of their race or national origin. We hold that such a policy and practice violates Section 8(a)(1) of the Act. If the Board finds that the company engages in such a policy and practice, it will devise an appropriate remedy.

Footnote 12, deleted from Petitioner's Appendix B:

12. The posture of this case leads us to order a remand on this issue. The unfair labor practice hearing against the company included a charged violation of § 8(a)(5) for failure to bargain about racial discrimination. However, the Board's General Counsel explicitly did not proceed on a theory that the discrimination itself violated § 8(a)(1). As noted, evidence indicating racial discrimination was produced to aid in finding whether there was a § 8(a)(5) bargaining violation. Thus the matter of the company's racial policies was litigated and the Examiner found, and the Board agreed, that the company did practice racial discrimination. We think, however, that in fairness to the company it should have an opportunity to have the matter more fully litigated, with notice that the question of a § 8(a)(1) violation is specifically to be deter-

mined. Thus the case is remanded to the Board to conduct such a hearing.

We note where the matter is litigated, even though the particular violation has not been specifically charged, the Board can find such a violation. See *American Newspaper Publishers Ass'n* v. *N. L. R. B.*, 7 Cir., 193 F. 2d 782 (1951); *Independent Metal Workers Union, Local No. 1*, 147 N. L. R. B. 1573 (1964).

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit.

United Packinghouse, Food and Allied Workers International Union, AFL-CIO, *Petitioner*, *vs.* National Labor Relations Board, *Respondent*, Farmers' Cooperative Compress, *Intervenor.*	No. 21,627
Farmers' Cooperative Compress, *Petitioner*, *vs.* National Labor Relations Board, *Respondent*, United Packinghouse, Food and Allied Workers International Union, AFL-CIO, *Intervenor.*	No. 21,825

(Stamp: United States Court of Appeals for the District of Columbia Circuit Filed Mar 19 1969 Nathan J. Paulson Clerk.)

JUDGMENT.

Before: Prettyman, Senior Circuit Judge, and Danaher* and Wright, Circuit Judges.

These consolidated causes were submitted to this Court upon the petitions of United Packinghouse, Food and Allied Workers International Union, AFL-CIO and Farmers' Cooperative Compress to review, and the cross-petition of the Board to enforce its order issued on January 23, 1968, against Farmers' Cooperative Compress, its officers, agents, successors and assigns.

The Court heard argument of respective counsel on November 25, 1968, and has considered the briefs and transcript of record filed in these causes. On February 7, 1969, the Court, being fully advised in the premises handed down its opinion granting enforcement of the Board's order against the company, and remanding the case for further proceedings consistent with the Court's opinion. In conformity therewith, it is hereby,

ORDERED AND ADJUDGED by the Court that the said order of the National Labor Relations Board directed against Farmers' Cooperative Compress, be enforced and that Farmers' Cooperative Compress, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained;

---

* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the case be and it hereby is remanded to the Board for further proceedings consistent with the Court's opinion.

JOHN A. DANAHER,
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

E. BARRETT PRETTYMAN,
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

J. SKELLY WRIGHT,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.